

## OFFICIAL

Our ref: 2021-104592

Dear Discloser

I refer to your request for a review of my decision. I note the voluminous nature of your request. We will not be actioning the request as it stands. You are welcome to provide us with 3 pages explaining why you believe the decision was wrong. We can then assess the request and decide whether to conduct a review.

Kind regards

Mark  
A/g Assistant Director  
Public Interest Disclosure Team  
COMMONWEALTH OMBUDSMAN  
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*Influencing systemic improvement in public administration*

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**From:** Discloser (External Disclosure)  
**Sent:** Friday, 10 March 2023 7:49 PM  
**To:** Ombudsman <[Ombudsman@ombudsman.gov.au](mailto:Ombudsman@ombudsman.gov.au)>; Iain Anderson <[iain.anderson@ombudsman.gov.au](mailto:iain.anderson@ombudsman.gov.au)>  
**Cc:** PID <[PID@ombudsman.gov.au](mailto:PID@ombudsman.gov.au)>; Emma Cotterill <[Emma.Cotterill@ombudsman.gov.au](mailto:Emma.Cotterill@ombudsman.gov.au)>; Katrina Dwyer <[katrina.dwyer@ombudsman.gov.au](mailto:katrina.dwyer@ombudsman.gov.au)>; Mark Anstey <[Mark.Anstey@ombudsman.gov.au](mailto:Mark.Anstey@ombudsman.gov.au)>  
**Subject:** [External] Request for review of Mark Anstey's decision: Ombudsman ref: 2021-104592

## I – APPLICATION FOR REVIEW

### Introduction

[1] On 26 October 2021, I lodged a complaint with the Office of the Commonwealth Ombudsman about the inadequacy of public interest disclosure investigated by Kate McMullan of the Australian Public Service Commission.

[2] On 12 December 2022, 412 days after I lodged my complaint, Mark Anstey, an acting assistant director in the Public Interest Disclosure team of the Office of the Commonwealth Ombudsman, rendered his decision.

[3] This is an application for review of Mark Anstey's decision. <sup>1</sup>

#### Timeliness of application

[4] According to the website of the Office of the Commonwealth Ombudsman, <sup>2</sup> “[a] request should be made in writing within three months of being told of our final decision.” This application has been made within three months of Mark Anstey's decision of 12 December 2022.

#### Where application should be sent

[5] According to the Review information sheet and request form, which is downloadable on the website of the Office of the Commonwealth Ombudsman, <sup>3</sup> a request for review should be sent to [ombudsman@ombudsman.gov.au](mailto:ombudsman@ombudsman.gov.au). I have also copied the following people into this email:

a) Iain Anderson, the Commonwealth Ombudsman, so that he is aware of the request for review and, more importantly, is aware of Mark Anstey's demonstrated incompetence (I will demonstrate that Mark Anstey has an unacceptable command of the *Public Interest Disclosure Act 2013* (Cth), authorities of the High Court and the Full Court of the Federal Court, basic logic and the facts relevant to my complaint);

b) Emma Cotterill, the Senior Assistant Ombudsman responsible for the Public Interest Disclosure team;

c) Katrina Dwyer, the person who was introduced to the Senate's Legal and Constitutional Affairs Legislation Committee as the Acting Director of the Public Interest Disclosure team during the public hearing on the Public Interest Disclosure Amendment (Review) Bill 2022; and

d) Mark Anstey, the acting Assistant Director in the Public Interest Disclosure team, so that he can reflect on his incompetence and use this as an opportunity to advance himself.

#### Reference number

[6] Mark Anstey noted that the reference number for his decision was “2021-104592”.

#### Contact details

[7] You already have my contact details and they remain the same.

#### Grounds of review and complaint

[8] In this email, I set out, in parts IV – XI, 8 general grounds of review. The grounds of review range from errors of law, including a jurisdictional error on Mark Anstey’s part, errors of fact made by Mark Anstey during his investigation under the *Ombudsman Act 1976* (Cth), and other errors.

[9] In part XII, I set out a ground of complaint about the time it took Mark Anstey to provide his decision.

[10] I also set out, in part XIII, specified grounds of review. The grounds of review, being specific to the circumstances relating to the recruitment of registrars of the Federal Court, are organised by reference to each registrar’s recruitment.

## **II – THREE BROAD GROUNDS MARK ANSTEY RELIED ON TO TERMINATE INVESTIGATION UNDER THE OMBUDSMAN ACT 1976 (CTH)**

[11] From the outset, I note that Mr Anstey's process of reasoning is meandering and, at times, difficult to make sense of. I also note that Mr Anstey did not identify the power upon which he relied to terminate his investigation under the *Ombudsman Act 1976* (Cth), although, given the context of his record of decision, I assume that Mr Anstey relied on subsection 12(1) of the *Ombudsman Act 1976* (Cth) to terminate his investigation.

[12] Mr Anstey appears to have justified terminating his investigation on three broad grounds.

[13] First, Mr Anstey stated:

I appreciate that you are likely to be disappointed by the outcome of your complaint given your view there were numerous deficiencies with the investigation of the PID and the resulting report under s 51 of the Public Interest Disclosure Act 2013 (PID Act). It is important to note that our Office cannot take any action that would cause an agency to reinvestigate a PID. This is because the PID Act does not provide a mechanism for a finalised PID investigation to be reopened.

[14] Thus, Mr Anstey terminated the investigation under the *Ombudsman Act 1976* (Cth) because, in his opinion, the Office of the Commonwealth Ombudsman "cannot take any action that would cause an agency to reinvestigate a PID ... because the PID Act does not provide a mechanism for a finalised PID investigation to be reopened."

[15] Second, Mr Anstey stated:

Our Office has broad discretion to decline to further investigate when we consider it is not warranted having regard to all the circumstances. There are various considerations relevant to the exercise of this discretion. One key factor is whether further investigation is likely to result in a practical or otherwise substantive outcome. In this case it is my view there is no practical outcome we could obtain by further investigating the complaint.

[16] Thus, a key factor in Mr Anstey's decision to terminating the investigation under the *Ombudsman Act 1976* (Cth) was his view that no practical outcome could be obtained by further investigation of the complaint.

[17] Third, Mr Anstey states:

Based on our investigation, which involved seeking copies of internal records from the Investigating Agency and interviewing the PID Investigator, I consider there are several ways in which the PID investigation and associated report could have been improved. That said, as noted below, I found that most of the key findings were not unreasonable for the Investigating Agency to make.

[18] Thus, Mr Anstey terminated the investigation under the *Ombudsman Act 1976* (Cth) because, in his opinion, most of the key finding that Kate McMullan made were not unreasonable for her to make.

### **III – A SUMMARY OF THE GROUNDS OF REVIEW**

[19] Part IV of this email sets out an analysis of why Mark Anstey's claim that the Office of the Commonwealth Ombudsman "cannot take any action that would cause an agency to reinvestigate a PID ... because the PID Act does not provide a mechanism for a finalised PID investigation to be reopened" is, as a matter of law, nonsense.

[20] Part V of this email sets out an analysis of why Mark Anstey's claim that "no practical outcome" could be obtained by further investigation of the complaint in the inadequacy of Kate McMullan's public interest disclosure investigation is, as a matter of law and as a matter of fact, nonsense.

[21] Part VI of this email sets out, in the light of judgments of the High Court of Australia and the Full Court of the Federal Court of Australia, an analysis of the error of law committed by Mark Anstey when he failed to disclose material information used to make a decision adverse to my rights and interests and, thus, failed to afford me procedural fairness.

[22] Part VII of this email sets out an analysis of Mark Anstey's failure to identify logically probative and relevant evidence that he relied on to make findings of fact and draw conclusions on the way to making his decision to terminate his investigation under the *Ombudsman Act 1976* (Cth).

[23] Part VIII of this email demonstrates Mark Anstey's selective use of materials available to him to support findings that were convenient to him and his preconceived conclusions rather than

addressing and assessing the totality of the materials available to him to make a lawful decision under the *Ombudsman Act 1976* (Cth).

[24] Part IX of this email demonstrates how Mark Anstey went out of his way to ignore specified and well articulated grounds of complaint set out in my correspondence of 26 October 2021, presumably to justify his decision to terminate his investigation under the *Ombudsman Act 1976* (Cth).

[25] Part X of this email sets out an analysis of Mark Anstey's failure to apprehend the relevant legal standards that applied to his investigation under the *Ombudsman Act 1976* (Cth).

[26] Part XI of this email demonstrates the logical incoherence of Mark Anstey's statements on the reviewability of Kate McMullan's public interest disclosure investigation.

[27] Part XII of this email addresses the sheer inappropriateness of Mark Anstey keeping me waiting 412 days from the date my complaint was made to notify me that, *as a matter of law and independent of the facts of my complaint*, since "the PID Act does not provide a mechanism for a finalised PID investigation to be reopened" the Commonwealth Ombudsman "cannot take any action that would cause an agency to reinvestigate a PID", which, as I demonstrate in part IV of this email, as a legal proposition, complete nonsense.

[28] Part XIII of this email sets out grounds of review that are specific to unlawful actions taken by officials in the Federal Court in respect of decisions to engage or "promote" ten registrars of the Federal Court of Australia. Part XIII has, for the most part, been prepared to dispel Mark Anstey's conclusions that most of the key finding that Kate McMullan made were not unreasonable for her to make, thus justifying the decision in Mr Anstey's mind to terminate his investigation under the *Ombudsman Act 1976* (Cth).

[29] Much of Part XIII focuses on the evidence that Mark Anstey overlooked during the 412 days that officials in the Office of the Commonwealth Ombudsman faffed about before Mark Anstey decided to terminate the investigation commenced under section 8 of the *Ombudsman Act 1976* (Cth) by Penny McKay, the acting Commonwealth Ombudsman.

## **IV – GENERAL GROUND OF REVIEW – “REOPENING” A FINALISED PUBLIC INTEREST DISCLOSURE INVESTIGATION**

[30] In his record of decision, Mark Anstey stated that the Office of the Commonwealth Ombudsman “cannot take any action that would cause an agency to reinvestigate a PID ... because the PID Act does not provide a mechanism for a finalised PID investigation to be reopened.”<sup>4</sup>

[31] To the extent that Mr Anstey is claiming that disclosable conduct set out in a public interest disclosure cannot be reinvestigated, that is demonstrably false.

[32] First, there is nothing in the nature of an administrative decision, such as a decision made under the *Public Interest Disclosure Act 2013* (Cth), which requires a conclusion that a power to make a decision, when purportedly exercised, is necessarily spent: *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, [5].

[33] As Gleeson CJ noted, the real issue is “whether the statute pursuant to which the decision maker was acting manifests an intention to permit or prohibit reconsideration in the circumstances that have arisen”: *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, [8].

[34] Second, the meaning of the word “investigate” “in relation to a disclosure, means investigate (or reinvestigate) whether there are one or more instances of disclosable conduct”: *Public Interest Disclosure Act 2013* (Cth), s 47(2).

[35] Where a person conducting an investigation under the Ombudsman Act 1976 (Cth) finds that a public interest disclosure investigation (or aspect of a public interest disclosure investigation) are inadequate (which, for the reasons set out in the external disclosure report, they were), or that, in some respects, Kate McMullan did not exercise her lawful duty to investigate (which, for the reasons set out in the external disclosure report, happens to be the case), then the duty to investigate a public interest disclosure according to law, which extends to reinvestigation, would be enlivened.

[36] Parliament has explicitly provided powers (to adopt Mr Anstey’s choice of terminology) to “reopen” a finalised public interest disclosure investigation because Parliament has, in the relevant Part and Division of the *Public Interest Disclosure Act 2013* (Cth), explicitly defined the word “investigate” as meaning “reinvestigate” “one or more instances of disclosable conduct”.

[37] Third, there is nothing in the *Public Interest Disclosure Act 2013* (Cth) that prohibits the re-investigation of a public interest disclosure because the original investigation was inadequate in law. On the contrary, the *Public Interest Disclosure Act 2013* (Cth) makes quite clear that one of its fundamental objects is to ensure that disclosures made by public officials are to be properly investigated and dealt with: *Public Interest Disclosure Act 2013* (Cth), s 6(d). It would be contrary to this object to infer that the re-investigation of a public interest disclosure under the *Public Interest Disclosure Act 2013* (Cth) is prohibited, particularly when the original investigation conducted by Kate McMullan is affected by legal errors, including errors that go to jurisdiction. Indeed, the inference to be drawn, in the light of the canons of statutory interpretation, is that re-investigation of a public interest disclosure under the *Public Interest Disclosure Act 2013* (Cth) is not only permitted, but encouraged because a fundamental object of the *Public Interest Disclosure Act 2013* (Cth) is to ensure that disclosures made by public officials are to be properly investigated and dealt with. To permit a disclosure to remain improperly investigated and improperly dealt with would be to actively defeat a fundamental object of the *Public Interest Disclosure Act 2013* (Cth).

[38] Fourth, the claim that the Office of the Commonwealth Ombudsman “cannot take any action that would cause an agency to reinvestigate a [public interest disclosure]” is demonstrably false because it is well within the Ombudsman’s power to, along with any report issued under section 15 of the *Ombudsman Act 1976* (Cth) to the Australian Public Service Commission, include “any recommendations he or she thinks fit”, which would extend to a recommendation to the Australian Public Service Commissioner to ensure that the public interest disclosure is properly investigated and dealt with. Practically speaking, were Mark Anstey to, under section 15 of the *Ombudsman Act 1976*, provide a report to the Australian Public Service Commissioner setting out the patent inadequacies of Kate McMullan’s PID investigation, and provide recommendations for reinvestigation of the disclosable conduct identified in my public interest disclosure disclosure, then the Australian Public Service Commissioner would be, by the force of section 15 of the *Ombudsman Act 1976*, given cause to conduct a proper and, by extension, lawful investigation (an investigation that is not inadequate).

[39] I hasten to add that just because officials in the Office of the Commonwealth Ombudsman may not be able to *compel* the Australian Public Service Commissioner or his staff to re-investigate a public interest disclosure is not to say that the Commonwealth Ombudsman (or his officials) “cannot take any action that would cause an agency to re-investigate a PID.” The power to compel a particular course of action does not exhaust the Commonwealth Ombudsman’s ability to take action that would cause an agency to re-investigate a public interest disclosure. Were this the case, then the entire concept of lodging complaints with the Office of the Commonwealth Ombudsman in respect of an agency’s failure to conduct a lawful public interest disclosure investigation would be feckless.

[40] In conclusion, that Mr Anstey has decided to terminate his investigation because he believes the Commonwealth Ombudsman (or his officials) “cannot take any action that would cause an agency to reinvestigate a PID ... because the PID Act does not provide a mechanism for a finalised PID investigation to be reopened” demonstrates how misconceived and incorrect Mark’s decision to terminate his investigation is because, plainly:

a) the definition of investigating disclosable conduct set out in a public interest disclosure extends to the reinvestigation of disclosable conduct set out in a public interest disclosure; and

b) the Commonwealth Ombudsman (or his officials) can take action that would cause an agency to reinvestigate a public interest disclosure.

[41] Indeed, where the Commonwealth Ombudsman or his officials find that an investigation is inadequate, the Commonwealth Ombudsman and his officials must take such action that would give effect to the Parliamentary mandate that disclosures made by public officials are to properly investigated and dealt with.

[42] Mark Anstey is claiming that once a public interest disclosure investigation is finalised, regardless of whether the decision or the processes adopted are lawful, the disclosable conduct set out in the internal disclosure cannot, as a matter of law, be reinvestigated “because the PID Act does not provide a mechanism for a finalised PID investigation to be reopened.”

[43] The implication of Mr Anstey’s claim that a public interest disclosure cannot be reinvestigated “because the PID Act does not provide a mechanism for a finalised PID investigation to be reopened” is that, in the last decade, during which the *Public Interest Disclosure Act 2013* (Cth) has not been substantively amended, there has never been “a mechanism for a finalised PID investigation to be reopened.” Is the Australian community to understand that in the last decade, right or wrong, deficient, inadequate or otherwise, once a public interest disclosure investigation was finalised, there was simply no “mechanism for a finalised PID investigation to be reopened”, such that a deficient or inadequate investigation was final and binding?

[44] What is the point of having a right to complain to the Office of the Commonwealth Ombudsman about the inadequacy of a public interest disclosure investigation if the legal position is, as Mark Anstey erroneously claims it to be, that a public interest disclosure cannot be reinvestigated “because the PID Act does not provide a mechanism for a finalised PID investigation to be reopened”? In the light of the *Public Interest Disclosure Act 2013* (Cth) and the judgments of the High Court of Australia, the idiocy and unjustifiability manifested in the conclusion, which Mark Anstey took 412 days to come up with, are patent.

## **V – GENERAL GROUND OF REVIEW – NO “PRACTICAL OUTCOME” IN INVESTIGATING INADEQUATE PUBLIC INTEREST DISCLOSURE**

[45] In his record of decision, Mark Anstey stated that it was his view that no practical outcome could be obtained by further investigation of the complaint into the inadequacy of Kate McMullan's public interest disclosure investigation.<sup>5</sup> That is nonsense.

[46] The practical outcome of the further investigation of the complaint under the *Ombudsman Act 1976* (Cth) would be to ensure that public officials at the Australian Public Service Commission are made aware of the patent inadequacies of Ms McMullan's PID investigation, and that, as a result of their recognition of Ms McMullan's failures, officials in the Australian Public Service Commission make sure, following Mr Anstey's recommendation (under section 15 of the *Ombudsman Act 1976*) to investigate the public interest disclosure because Kate McMullan's investigation was inadequate, that the internal disclosure is properly investigated and dealt with according to law because Parliament has mandated that disclosures by public officials are to be properly investigated and dealt with: *Public Interest Disclosure Act 2013* (Cth), s 6(d).

[47] I also note that talk of practicality is misplaced. Practicality is a subordinate consideration. Legality is what Mark should have directed his mind to. Parliament has mandated that disclosures by public officials are to be properly investigated and dealt with. In terminating the investigation he was conducting under section 8 of the *Ombudsman Act 1976* (Cth), all Mark Anstey has ensured is that the internal disclosure that was allocated to the Australian Public Service Commission, on 11 May 2020, by Elizabeth Bennet of the Office of the Commonwealth Ombudsman will not be properly investigated and dealt with. In other words, in deciding to abort his investigation under section 8 of the *Ombudsman Act 1976* (Cth) because continuing with the investigation is "not warranted having regard to all the circumstances", Mr Anstey has undermined an express object of the *Public Interest Disclosure Act 2013* (Cth) – the Parliamentary mandate that disclosures by public officials are to be properly investigated and dealt with.

## **VI – GENERAL GROUND OF REVIEW – FAILURE TO DISCLOSE MATERIAL INFORMATION USED TO MAKE ADVERSE DECISION**

### Disclosure of information as a fundamental manifestation of procedural fairness

[48] In *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, a unanimous High Court stated:<sup>6</sup>

In *Alphaone* [*Commissioner for Australian Capital Territory Revenue v Alphaone* (1994) 49 FCR 576] the Full Court rightly said:

"It is a fundamental principle that where the rules of procedural fairness apply to a decision-making process, the party liable to be directly affected by the decision is to be given the opportunity of being heard. *That would ordinarily require the party affected to be given the opportunity of ascertaining the relevant issues and to be informed of the nature and content of adverse material.*" (emphasis added)

[49] In SZBEL, a unanimous High Court also endorsed, at [29], the following passage of the Full Court of the Federal Court's judgment in *Commissioner for Australian Capital Territory Revenue v Alphaone* (1994) 49 FCR 576:

Where the exercise of a statutory power attracts the requirement for procedural fairness, a person *likely to be affected* by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker. *It also extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material ...*

[50] Endorsing SZBEL, a unanimous Full Court of the High Court of Australia stated, in *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180: <sup>2</sup>

Ordinarily, affording a reasonable opportunity to be heard in the exercise of a statutory power to conduct an inquiry requires that a person whose interest is apt to be affected be put on notice of: the nature and purpose of the inquiry; the issues to be considered in conducting the inquiry; and *the nature and content of information that the repository of power undertaking the inquiry might take into account as a reason for coming to a conclusion adverse to the person.*

[51] Thus:

a) where the rules of procedural fairness apply to a decision making process, the party liable to be directly affected by the decision is to be given the opportunity of being heard, which entails being given the opportunity to ascertain the relevant issues before the decision maker and to be informed

of the *nature and content of materials adverse to the interests of the party* that are before the decision maker; and

b) where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests; and

c) where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker; and

d) where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to receive, from the decision maker, information identifying any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made; and

e) where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to be advised, by the decision maker, of any adverse conclusion that has been arrived at which would not obviously be open on the known material.

#### Procedural fairness under the Ombudsman Act 1976 (Cth)

[52] In *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 242, a plurality of the High Court stated:<sup>8</sup>

Brennan J in *Kioa v West* explained that all statutes are construed against a background of common law notions of justice and fairness. His Honour said:

"[W]hen the statute does not expressly require that the principles of natural justice be observed, the court construes the statute on the footing that 'the justice of the common law will supply the omission of the legislature'. The true intention of the legislation is thus ascertained."

[53] The plurality of the High Court then noted: <sup>9</sup>

Observance of the principles of natural justice is a condition attached to such a statutory power and governs its exercise, as Brennan J further explained in *Kioa v West*. A failure to fulfil that condition means that the exercise of the power is inefficacious. A decision arrived at without fulfilling the condition cannot be said to be authorised by the statute and for that reason is invalid.

[54] Thus, the courts will not infer that the Parliament will overthrow or depart from fundamental principles, including the principles of natural justice without expressing its intentions with *irresistible clearness*.<sup>10</sup>

[55] The Commonwealth Ombudsman is empowered to conduct an investigation in private and, subject to the *Ombudsman Act 1976* (Cth), in such manner as the Ombudsman thinks fit. <sup>11</sup> Moreover, where the Ombudsman does not, for any reason, investigate, or continue to investigate, action taken by a Department or by a prescribed authority in respect of which a complaint has been made to him or her, the Ombudsman shall, as soon as practicable and in such manner as the Ombudsman thinks fit, inform the complainant of his or her decision and of the reasons for his or her decision.<sup>12</sup>

[56] That being said, nothing in the *Ombudsman Act 1976* (Cth) provides a reader of the enactment with the impression that Parliament has, with irresistible clearness, ousted natural justice, or the principles of procedural fairness, and to suggest that acting “as the Ombudsman thinks fit” is sufficient to out the requirements of natural justice or procedural fairness would not accord with authority.

[57] Indeed, in the context of a statute that provided an unqualified power to remove a person from office and, thus, “prejudice the applicant’s rights and interests”, <sup>13</sup> Chief Justice Gleeson noted that “[t]he very breadth of the statutory power seems to me to be an argument for, rather than against, a conclusion that it was intended to be exercised fairly.” <sup>14</sup> Thus, broad statutory powers, like the Ombudsman’s powers to investigate or terminate an investigation “as the Ombudsman thinks fit”, are to be understood as requiring the fair (i.e. procedurally fair) exercise of those powers, and not otherwise.

[58] Therefore:

a) the power to investigate in private in a manner as the Ombudsman thinks fit is; or

b) the power to terminate an investigation in respect of a complaint that has been made in such a manner as the Ombudsman thinks fit,

cannot, in the absence of irresistible language to the contrary, or “plain words of necessary intendment”,<sup>15</sup> be taken as powers unfettered by the requirements of procedural fairness or natural justice, particularly where the exercise of those powers *likely*<sup>16</sup> to “prejudice the applicant’s rights and interests.” In the light of the authorities cited, it simply cannot be argued that the Commonwealth Ombudsman, or his staff, are not bound by the requirements of natural justice or procedural fairness in the course of making administrative decisions under the *Ombudsman Act 1976* (Cth) (and, especially, under subsections 8(2) and 12(1) of the *Ombudsman Act 1976* (Cth)).

[59] As such, the exercise of a statutory powers under subsections 8(2) and 12(1) of the *Ombudsman Act 1976* (Cth) attract the requirements for procedural fairness, which include, among other things:

a) the opportunity to ascertain the relevant issues before the decision maker and to be informed of the *nature and content of materials adverse to the interests of the party* that are before the decision maker; and

b) the entitlement to put information and submissions to the decision-maker in support of an outcome that supports his or her interests; and

c) the entitlement to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker; and

d) the entitlement to receive, from the decision maker, information identifying any issue critical to the decision that is not apparent from its nature or the terms of the statute under which it is made; and

e) the entitlement to be advised, by the decision maker, of any adverse conclusion that has been arrived at that would not obviously be open on the known material.

The failure to disclose material information used to make an adverse decision

[60] An example of Mr Anstey's contempt for the requirements of procedural fairness is evident on the face of the record of his decision.

[61] According to Mr Anstey's record of decision, dated 12 December 2022: [17](#)

You alleged one candidate's appointment was unmeritorious because the appointee did not possess one of the criteria listed as an essential requirement for the position ...

As part of this investigation we sought advice from the APSC in its capacity as the agency with policy responsibility in this area. The APSC, in this capacity, advised that an agency can appoint a person in these circumstances if there is a reasonable basis to conclude the person will meet essential criteria for the position within a short period.

While I appreciate that you may have a different view on this, the PID Investigator's finding that disclosable conduct did not occur aligns with the view of the agency with policy responsibility in this area.

[62] It has been established that Mr Anstey's exercise of statutory powers under subsections 8(2) and 12(1) of the *Ombudsman Act 1976* (Cth) attracted the requirements for procedural fairness. Among other things, the Full Court of the Federal Court and the High Court of Australia have adjudged that the fundamentals of procedural fairness require: [18](#)

a) the opportunity to ascertain the relevant issues before the decision maker and to be informed of the *nature and content of materials adverse to the interests of the party* that are before the decision maker; and

b) the entitlement to put information and submissions to the decision-maker in support of an outcome that supports his or her interests; and

c) the entitlement to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker; and

d) the entitlement to receive, from the decision maker, information identifying any issue critical to the decision that is not apparent from its nature or the terms of the statute under which it is made; and

e) the entitlement to be advised, by the decision maker, of any adverse conclusion that has been arrived at that would not obviously be open on the known material.

[63] First, in the 412 days that the officials at the Office of the Commonwealth Ombudsman considered my complaint of 26 October 2021, not once was I contacted about Mr Anstey soliciting *advice* from the agency he was investigating. Thus, I was not contacted by Mr Anstey about advice noting that “an agency can appoint a person in these circumstances if there is a reasonable basis to conclude the person will meet essential criteria for the position within a short period.”

[64] This ***advice*** (as distinct to a submission on the correct interpretation of law or on the relevant facts), which Mark Anstey adopted as determinative of the issues before him in relation to the recruitment of Rohan Muscat to fill a National Registrar vacancy:

a) was adverse to my interest in having the disclosable conduct that I reported in a public interest disclosure being “properly investigated and dealt with”;<sup>19</sup>

b) contained content that was adverse to my interest in having the disclosable conduct that I reported in a public interest disclosure being “properly investigated and dealt with”; and

c) was, in effect, a statement that I had no idea about the law and that, at best, I was confused and misguided about the relevant laws and facts. Mark Anstey might as well have said “you don’t know what you’re talking about because the Australian Public Service Commission, the agency I am investigating, has provided me with advice, which I solicited, stating that your complaint has no legal merit”.

[65] Indeed, this ***advice***, which Mark Anstey adopted as determinative of the issues before him in relation to the recruitment of Rohan Muscat to fill a National Registrar vacancy, was, in fact, irrelevant to the issues before him. As I note in part XIII, sub-part 2 of this email:

Ms McMullan had committed a fallacy of reasoning.<sup>20</sup> Specifically:<sup>21</sup>

Ms McMullan’s claim that “the lack of essential requirement at the date of application [does not constitute] disclosable conduct within the meaning of the PID Act” is a classic straw man fallacy. Rohan Muscat’s failure to meet an essential requirement to successfully fill vacancy NN 10725189 [i.e. a National Registrar vacancy] at the date he submitted his application was never an issue.

Every member of the public is at liberty to apply for a position in the Australian Public Service, regardless of whether they meet the criteria set out in respect of the relevant position. Rohan Muscat was as much at liberty to apply to fill vacancy NN 10725189 as any other member of the public. The issue was not that Mr Muscat applied to fill a vacancy that he could not, on an objective assessment of his application, have filled. The issue was that the selection process was not applied fairly, by members of the selection panel convened to assess the candidates who had applied to fill vacancy NN 10725189, in relation to each eligible applicant.

The relevant issue was that “members of the selection panel” had failed to, at all times, behave in a way that upheld the APS Employment Principles, which includes making decisions relating to engagement and promotion based on merit. [22](#)

...

The Australian Public Service Commission’s advice “that an agency can appoint a person in ... circumstances if there is a reasonable basis to conclude the person will meet essential criteria for the position within a short period” is not on point.

The disclosable conduct was that officials in the Federal Court of Australia Statutory Agency engaged a candidate to the position of National Registrar in contravention of their duty, under the Code of Conduct, to at all times behave in a way that uphold the APS Employment Principles, which includes making decisions relating to engagement and promotion based on merit. [23](#)

Decisions relating to engagement and promotion are based on merit when: [24](#)

- a) an assessment is made of the relative suitability of the candidates to perform the relevant duties, using a competitive selection process; and
- b) the assessment is based on the relationship between the candidates’ work related qualities and the work related qualities genuinely required to perform the relevant duties; and
- c) the assessment focuses on the relative capacity of the candidates to achieve outcomes related to the relevant duties; and

d) the assessment is the primary consideration in making the decision.

To demonstrate why the decision to select was not one based on merit, I again draw your attention to the selection criteria for the National Registrar vacancy, the application of another candidate, *Dr Natalie Cujes*, and Mr Muscat's claims against the selection criteria. Of course, I need not only draw your attention to the application of Dr Natalie Cujes; Mr Anstey had access to no less than 50 applications from candidates, all of whom met the formal qualifications for the National Registrar role and, thus, had superior claims to that role. I draw your attention to the application that Dr Natalie Cujes submitted because it is convenient to do so and because it demonstrates how Mark Anstey failed to engage competently with the complaint.

The selection criteria for the National Registrar vacancy included "admission as a practitioner of the High Court and/or the Supreme Court of a State or Territory" <sup>25</sup> and "[e]xperience in litigation and case management in superior courts of Australia." <sup>26</sup>

Dr Natalie Cujes: <sup>27</sup>

a) was admitted to practice in the Supreme Court of State or Territory, or the High Court, in 1994;

b) had, at the time she submitted her application for the National Registrar role, an unrestricted practising certificate and is a practitioner of considerable experience;

c) had held an appointment to the office of Deputy District Registrar in the Federal Court between 2000 and 2009;

d) is a recognised expert on the practice and procedure of the Federal Court and the Federal Circuit Court (currently Division 2 of the Federal Circuit and Family Court of Australia), having authored several works on the practice and procedure of those courts;

e) is an academic; and

f) has a PhD on case transfers between federal courts and consequent impacts on access to procedural justice.

Rohan Muscat:

a) had not been admitted to the Supreme Court of a State or Territory, or the High Court, when selected by the selection committee, or when the selection committee's decision was endorsed by Sia Lagos on 5 October 2018; and

b) had not, and has never, practised as a lawyer.

No reasonable person would or could conclude that the decision to engage Rohan Muscat ahead of Dr Natalie Cujes was based on merit because if a **competitive selection process**<sup>28</sup> had been conducted of the relative suitability of these two candidates to perform the relevant duties of a National Registrar in the Federal Court, then Dr Natalie Cujes would be selected ahead of Rohan Muscat every single time.

Even if we assume that the Australian Public Service Commission's advice "that an agency can appoint a person in ... circumstances if there is a reasonable basis to conclude the person will meet essential criteria for the position within a short period" is correct, it would only be applicable in a situation where every other candidate:

a) had not been admitted to the Supreme Court of a State or Territory, or the High Court; and

b) did not have experience in litigation and case management in superior courts of Australia,

and Rohan Muscat had superior claims to fill the vacancy **relative to the other candidates**.

The Australian Public Service Commission's advice "that an agency can appoint a person in ... circumstances if there is a reasonable basis to conclude the person will meet essential criteria for the position within a short period" was of no relevance in a situation where scores of candidates had superior claims to performing the relevant duties relative to Rohan Muscat's claims.<sup>29</sup>

For Mr Anstey to suggest, in the light of the evidence, that it was legally permissible for members of the selection committee to:

a) ignore the relative suitability of other candidates to perform the relevant duties; and

b) select a candidate who did not have the attributes necessary, at the time of the selection process, to perform the relevant duties,

because the Australian Public Service Commission provided advice "that an agency can appoint a person in ... circumstances if there is a reasonable basis to conclude the person will meet essential criteria for the position within a short period" would be to, among other things, suggest that:

c) the explicit terms of an enactment of the Parliament (i.e. *Public Service Act 1999* (Cth), ss 10A(1)(c) and 10A(2)) yield to the advice of "the agency with policy responsibility in this area"; and

d) it is legally permissible to make decisions to engage or promote candidates on a basis other than merit, as elaborated in subsection 10A(2) of the *Public Service Act 1999* (Cth).

Mr Anstey's reasons are bewildering, misguided and plainly wrong, and Mr Anstey's claim that "most of the key findings were not unreasonable for the investigating agency to make", to the extent that the claim applied to Ms McMullan's finding that "the lack of (sic) essential requirement at the date of application [does not constitute] disclosable conduct with in the meaning of the PID Act", is unjustifiable because the finding is vitiated by a fallacy.

[66] Despite being under a legal obligation to provide me with the opportunity to ascertain the **relevant issues** before him, and to be **informed** of the **nature** and **content of materials adverse to my interest in having the disclosable conduct that I reported in a public interest disclosure being "properly investigated and dealt with"**, in the 412 days available to him, Mark Anstey **did not** provide me with the opportunity to ascertain the **relevant issues** before him and to be **informed** of the **nature** and **content of materials adverse to my interest in having the disclosable conduct that I reported in a public interest disclosure being "properly investigated and dealt with."** In other words, Mark Anstey arrogated to himself the right to trash the judgments of the High Court of Australia and, unlawfully, make an administrative decision.

[67] Second, since I was not contacted by Mr Anstey about his having solicited *advice* from the agency he was investigating noting that "an agency can appoint a person in these circumstances if there is a reasonable basis to conclude the person will meet essential criteria for the position within a short period", I was denied my legal entitlement to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources (e.g. the Australian Public Service Commission) which is put before the decision-maker.

[68] I have already established that the *advice* (as distinct to a submission on the correct interpretation of law or on the relevant facts) Mark Anstey solicited from the agency he was investigating, which he adopted as determinative of the issues before him in relation to the recruitment of Rohan Muscat to fill a National Registrar vacancy, was adverse to my interest in having the disclosable conduct that I reported in a public interest disclosure being "properly investigated and dealt with."<sup>30</sup> That advice was solicited from another source (i.e. the Australian Public Service Commission) and was acted on as advice (i.e. statements determinative of the issues before Mr Anstey in relation to the recruitment of Rohan Muscat to fill a National Registrar vacancy).

[69] In the 412 days that that the officials at the Office of the Commonwealth Ombudsman considered my complaint of 26 October 2021, Mark Anstey *did not give me an opportunity to rebut or qualify by further information, and comment by way of submission, upon material from the agency he was investigating*, which Mark Anstey adopted as determinative of the issues before him in relation to the recruitment of Rohan Muscat to fill a National Registrar vacancy, *that was adverse*

*to my interest, and right, in having the disclosable conduct that I reported in a public interest disclosure being “properly investigated and dealt with.”*<sup>31</sup>

[70] In other words, Mark Anstey arrogated to himself the right to trash the judgments of the High Court of Australia<sup>32</sup> and, unlawfully, make an administrative decision.

[71] Third, since I was not contacted by Mr Anstey about his having solicited *advice* from the agency he was investigating noting that “an agency can appoint a person in these circumstances if there is a reasonable basis to conclude the person will meet essential criteria for the position within a short period”, it follows that I was not notified of Mr Anstey’s intention to draw a conclusion that was adverse to my interest, and right, in having the disclosable conduct that I reported in a public interest disclosure being “properly investigated and dealt with” on the basis of material (advice, to boot), the contents of which was unknown to me.

[72] I have already established that the *advice* (as distinct to a submission on the correct interpretation of law or on the relevant facts) Mark Anstey solicited from the agency he was investigating, which he adopted as determinative of the issues before him in relation to the recruitment of Rohan Muscat to fill a National Registrar vacancy, was adverse to my interest in having the disclosable conduct that I reported in a public interest disclosure being “properly investigated and dealt with.”<sup>33</sup> That advice was solicited from another source (i.e. the Australian Public Service Commission) and was acted on as advice (i.e. statements determinative of the issues before Mr Anstey in relation to the recruitment of Rohan Muscat to fill a National Registrar vacancy).

[73] I have also already established that:

a) Mark Anstey or his colleagues did not, in the 412 days available to them, notify me of the fact that Mr Anstey had sought the advice of the Australian Public Service Commission, “the agency with policy responsibility in [the] area [of merit-based selection processes]”; and

b) Mark Anstey or his colleagues did not, in the 412 days available to them, notify me of the nature and content of advisory materials adverse to my interest in having the disclosable conduct that I reported in a public interest disclosure being “properly investigated and dealt with”; and

c) Mark Anstey or his colleagues did not, in the 412 days available to them, notify me of the fact that the materials sourced from the agency being investigated were not submissions or evidence, but *advice*, which would be adopted as determinative of the issues before Mr Anstey in relation to the

recruitment of Rohan Muscat to fill a National Registrar vacancy because the Australian Public Service Commission is “the agency with policy responsibility in [the] area [of merit-based selection processes].”

[74] Mark Anstey was legally obligated to advise me of any adverse conclusion that had been arrived at that would not obviously be open on the known material, <sup>34</sup> but failed to uphold his *legal obligation to notify me of any adverse conclusion that had been arrived at that would not obviously be open on the known material* before finalising his decision to terminate the investigation under the *Ombudsman Act 1976* (Cth).

[75] In other words, Mark Anstey arrogated to himself the right to trash the judgments of the High Court of Australia<sup>35</sup> and, unlawfully, make an administrative decision.

[76] In fact, in the 412 days Mr Anstey and his colleagues had available to them, not once was I contacted to put forth submissions on any matter whatsoever.

[77] I will not have my complaint dismissed, by way of the termination of an investigation, by one who arrogates to himself the right to trash the judgments of the High Court of Australia in the process of dismissing my complaint.

[78] Despite what he may think, Mark Anstey is not above the judgments of the Full Court of the Federal Court. Despite what he may think, Mark Anstey is not above the judgments of the High Court of Australia. Despite what he may think, Mark Anstey is not above the laws of Australia.

[79] Mark Anstey’s decision, and reasons for decision, are either a reflection of his abject incompetence, or a reflection of a complete contempt for the principle of legality and the laws of Australia.

The consequences of a failure to disclose material information used to make an adverse decision – jurisdictional error

[80] In *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180, a unanimous Full Court of the High Court of Australia unambiguously stated: <sup>36</sup>

... compliance with an implied condition of procedural fairness requires the repository of a statutory power to adopt a procedure that is reasonable in the circumstances to afford an opportunity to be heard to a person who has an interest apt to be affected by exercise of that power. The implied condition of procedural fairness is breached, and jurisdictional error thereby occurs, if the procedure adopted so constrains the opportunity of the person to propound his or her case for a favourable exercise of the power as to amount to a "practical injustice".

[81] Despite the fact that the exercise of a statutory powers under subsections 8(2) and 12(1) of the *Ombudsman Act 1976* (Cth) attract the requirements for procedural fairness, Mark Anstey:

a) secretly solicited advice from the agency he was investigating; and

b) failed to inform me of the nature and content of this secret advice that was adverse to my interest in having the disclosable conduct that I reported in a public interest disclosure being “properly investigated and dealt with”; and

c) failed to advise me of any adverse conclusion that had been arrived at that would not obviously be open on the known material; and

d) failed to provide me with an opportunity to rebut or qualify by further information, and comment by way of submission, upon the secret advice that was before the decision-maker, and was adopted as determinative of the issues before Mr Anstey in relation to the recruitment of Rohan Muscat to fill a National Registrar vacancy because the Australian Public Service Commission is “the agency with policy responsibility in [the] area [of merit-based selection processes]”.

[82] The implied condition of procedural fairness, which includes the matters identified by the High Court in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 and *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180, was breached, so constraining my opportunity to propound a case for the exercise of the power under section 12 of the *Ombudsman Act 1976* (Cth) that not prejudicial to my rights and interests in having the disclosable conduct that I reported in a public interest disclosure being “properly investigated and dealt with.”

[83] In other words, Mark Anstey’s decision is affected by jurisdictional error.

The inappropriateness of soliciting secret advice from the agency being investigated

[84] Mark Anstey or his colleagues did not, in the 412 days available to them, notify me of the fact that the materials sourced from the agency being investigated were not submissions or evidence, but *advice*, which would be adopted as determinative of the issues before Mr Anstey in relation to the recruitment of Rohan Muscat to fill a National Registrar vacancy because the Australian Public Service Commission is “the agency with policy responsibility in [the] area [of merit-based selection processes].” ***I cannot stress how inappropriate this is.*** It is mind-boggling.

[85] Bad enough though it would be, this is not a case of Mr Anstey seeking materials, in the form of evidence of submissions, that were adverse to my interests and which Mr Anstey did not, contrary to his legal obligations, draw to my attention so as to permit me to comment on. Mr Anstey would still have fallen foul of the law had he done this.

[86] This is a case of Mark Anstey soliciting ***advice*** (not evidence or submissions), from the agency he was investigating, on the basis that the Australian Public Commission’s position would be adopted as determinative of the issues in relation to the recruitment of Rohan Muscat to fill a National Registrar vacancy because the Australian Public Service Commission is “the agency with policy responsibility in [the] area [of merit-based selection processes].

[87] That Mark Anstey adopted the advice uncritically is apparent on the face of the record. He did not independently evaluate the relevance of the advice to the issue at hand (i.e. whether the members of the selection committee convened to select candidates for the National Registrar vacancy (Sia Lagos, David Pringle and Andrea Jarratt) selected the candidates of the basis of merit, which included conducting a competitive selection process to determine the relative suitability of candidates, who applied to fill the National Registrar vacancy, to perform the relevant duties of a National Registrar in the Federal Court), which, as I have already demonstrated in paragraph 65 of this email, was entirely irrelevant. In other words, Mark Anstey abdicated his duty to conduct an independent investigation under the *Ombudsman Act 1976* (Cth) to the very agency he was investigating and, without any critical assessment of the advice he had solicited in secret, Mr Anstey terminated his investigation because the agency he was investigating, being “the agency with policy responsibility in [the] area [of merit-based selection processes], had advised him that “an agency can appoint a person in ... circumstances if there is a reasonable basis to conclude the person will meet essential criteria for the position within a short period”, even though the issue at hand was whether the persons responsible for engaging Rohan Muscat ahead of other candidates did so on the basis of merit, as set out in subsection 10A(2) of the *Public Service Act 1999* (Cth).

## **VII – GENERAL GROUND OF REVIEW – FAILURE TO ADEQUATELY IDENTIFY LOGICALLY PROBATIVE AND RELEVANT EVIDENCE UPON WHICH RELIANCE WAS PLACED**

### Failure to identify evidence upon which findings or conclusions were based

[88] In the *Administrative Review Best Practice Guide 4 – Decision Making: Reasons*, [37](#) which was issued by the Administrative Review Council, the following is noted: [38](#)

#### **The evidence on which the finding were based**

A statement of reasons must refer to the evidence on which each material finding of fact is based. It is not sufficient simply to list all the documents that were considered in reaching the decision. The statement should identify the evidence that was considered relevant, credible and significant in relation to each material finding of fact.

When referring to evidence it is not necessary to quote it or to provide a copy, so long as the evidence can be readily identified. The evidence might be identified by stating its source or nature, whichever is more intelligible and informative—for example, ‘the medical report from Dr X dated 20 June’.

The statement should demonstrate that each finding of fact is rationally based on evidence. If the evidence was conflicting, the statement should say which evidence was preferred and why.

[89] In his record of decision dated 12 December 2022, Mark Anstey states:

I acknowledge your dissatisfaction with the s 51 report. I agree it lacked one key feature our Office expects a s 51 report to contain ... [I]n our view, principles of good administration and the PID Standard require the summary of evidence in the report [to] include a discussion of the content of the evidence obtained, the investigator’s assessment of that evidence (for example, whether it is credible, consistent and compelling) and how the evidence shaped the investigator’s conclusions. We will provide feedback to the Investigating Agency on this point.

[90] Mr Anstey is content to criticise Ms McMullan for failing to identify the evidence upon which her findings were based, and, thus, failing to abide by the principles of good administration, but does not practise what he preaches. Consider the following example.

[91] Despite finding that:

[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented,

Mr Anstey has failed to identify the record (i.e. the item of evidence) in which the role review decision “was documented.”

[92] Apparently, the principles of good administration that Kate McMullan failed to abide by have no application to Mr Anstey or his reasons for decision. No doubt the irony was, much like the law, lost on Mr Anstey, which is to say nothing of the loss, on Mr Anstey, of the catch-cry at the footer of official documents and emails emanating from the Office of the Commonwealth Ombudsman – “*influencing systemic improvement in public administration*” (by ignoring the Administrative Review Council’s best practice guides!).

Federal Court’s concessions that no records of “role reviews” or “role evaluations” for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – QLD role, the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – WA role, and the Senior Executive Band 1 classified National Judicial Registrar exist

[93] What is particularly troubling about Mr Anstey’s claim that “[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented” is that authorised decision makers in the Federal Court of Australia have, pursuant to the *Freedom of Information Act 1982* (Cth), conceded that there is no documentary evidence of a role review having ever been conducted in respect of the National Judicial Registrar vacancies that were the subject of the public interest disclosure, or the National Judicial Registrar & District Registrar vacancies that were the subject of the public interest disclosure.

[94] In response to a freedom of information request for access to the “role evaluation records, prepared between 1 January 2017 and 31 December 2020, that show that the SES Band 1 classified National Judicial Registrar & District Registrar role in Queensland was, in light of the work value of

the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the Public Service Classification Rules 2000”,<sup>39</sup> an authorised decision maker, B Henderson, refused to provide access to the documents because the documents do not exist or cannot be found. <sup>40</sup>

[95] In response to a freedom of information request for access to the “role evaluation records, prepared between 1 January 2017 and 31 December 2020, that show that the SES Band 1 classified National Judicial Registrar & District Registrar role in Western Australia was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the Public Service Classification Rules 2000”,<sup>41</sup> an authorised decision maker, B Henderson, refused to provide access to the documents because the documents do not exist or cannot be found. <sup>42</sup>

[96] In response to a freedom of information request for access to “the role evaluation records, prepared between 1 January 2017 and 31 December 2020, that show that the SES Band 1 classified National Judicial Registrar role in the Federal Court was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the Public Service Classification Rules 2000”,<sup>43</sup> an authorised decision maker, B Henderson, refused to provide access to the documents because the documents do not exist or cannot be found. <sup>44</sup>

[97] Indeed, in response to a freedom of information request for “access to any and all documents (including but not limited to classification evaluation documents prepared for the ‘Legal 2’ and ‘SES1’ classification level registrar positions referred to in an Australian article published on 9 February 2022 titled Federal Court boss warned on job rule sidestep) that support acting assistant commissioner Kate McMullan’s conclusion that, in relation to the ‘National Judicial Registrar role’, ‘a role review process ... had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load’”, <sup>45</sup> an authorised decision maker, National Judicial Registrar & District Registrar Nicola Colbran, the most senior registrar in South Australia, set aside Registrar Claire Hammerton Cole’s original decision <sup>46</sup> on the grounds propounded in the internal review request, <sup>47</sup> and refused to provide access to the documents because the documents do not exist or cannot be found. <sup>48</sup>

[98] Given that decision makers in the Federal Court have refused to provide access to records of role reviews for the National Judicial Registrar & District Registrar – QLD role, the National Judicial Registrar & District Registrar – WA role, or the National Judicial Registrar role, I do wonder how it is that Mr Anstey found that “there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented.”

[99] Naturally, Kate McMullan must have made the findings that there were role reviews for the:

a) Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in Queensland; and

b) Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in Western Australia; and

c) Senior Executive Band 1 classified National Judicial Registrar vacancy,

on the basis of logically probative evidence and relevant evidence because she was under a legislative obligation to ensure that findings of fact were based on logically probative evidence, [49](#) and relevant evidence.[50](#)

[100] A freedom of information request for the document supporting Mr Anstey's finding that "there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented" should clarify Mr Anstey's failure to identify the evidence upon which his finding was based, such failure being contrary to the principles of good administration that Mr Anstey criticised Ms McMullan for failing to abide by.

[101] A word of warning – you would do well to read paragraphs [628] - [710] of this email intently. You will find that even Charmaine Sims, the General Counsel and the Australian Public Service Commission, has, in response to a request for information from the Office of the Australian Information Commissioner, conceded the following about the Judicial Registrar Recruitment Outcome document, which I provided to the Office of the Commonwealth Ombudsman on 26 October 2021 in the form of Annexure EDR-93:

Document 2 (Judicial Registrar Recruitment Outcome) was prepared by the Federal Court in the context of a recruitment process and was provided to Ms McMullan during the course of a PID investigation. The Commission acknowledges the primary purpose of the document is not for a role review.

[102] If Mr Anstey thinks that a document on which Warwick Soden left hand written notes about the Senior Executive Band 1 classifications that would have been allocated to Murray Belcher and Russell Trott under **rule 6** of the *Public Service Classification Rules 2000* (Cth) (and not rule 9, which is the rule that pertains to role evaluation) is logically probative of the facts that:

a) a role review of the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in Queensland was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, conducted and that the role was reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth); and

b) a role review of the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in Western Australia was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, conducted and that the role was reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth); and

c) a role review of the Senior Executive Band 1 classified National Judicial Registrar vacancy was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, conducted and that the role was reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth),

Mr Anstey better think again.

## **VIII – GENERAL GROUND OF REVIEW – SELECTIVE USE OF INFORMATION TO JUSTIFY FINDINGS AND CONCLUSIONS**

[103] I have, in part VI of this email, already demonstrated how Mark Anstey failed to disclose material information used to make an adverse decision when he solicited advice, which, even though irrelevant to the issue at hand (i.e. whether the members of the selection committee convened to select candidates for the National Registrar vacancy (Sia Lagos, David Pringle and Andrea Jarratt) selected the candidates of the basis of merit, which included conducting a competitive selection process to determine the relative suitability of candidates, who applied to fill the National Registrar vacancy, to perform the relevant duties of a National Registrar in the Federal Court), he adopted as determinative of the issues before him in relation to the recruitment of Rohan Muscat to fill a National Registrar vacancy because the Australian Public Service Commission is “the agency with policy responsibility in [the] area [of merit-based selection processes].”

[104] I add that, on a rational assessment of the advice that Mark Anstey sought from the very agency he was investigating, even a moderately intelligent grade school student would be able to discern that the advice provided by the agency being investigated, the Australian Public Service Commission, is irrelevant.

[105] I have, in part VI of this email, also demonstrated that the consequence of Mark Anstey's failure to disclose material information used to make an adverse decision is jurisdictional error.

[106] What compounds Mark Anstey's errors is the fact that Mark Anstey uses information selectively to justify his preconceived and, as demonstrated, legally and factually erroneous conclusions and findings.

An example of the selective use of information to justify preconceived and erroneous conclusions and findings

[107] An egregious example of Mark Anstey's selective use of information and to justify his preconceived and erroneous conclusions and findings can be demonstrated by reference to Mark Anstey's decision in respect of Kate McMullan's "findings" about lawful "role reviews."

[108] Consider the reasons provided by Kate McMullan in respect of the:

a) "engagements of Susan O'Connor, Claire Gitsham, Matthew Benter, Phillip Allaway, Rupert Burns and Tuan Van Le as National Judicial Registrars in the FCA"; [51](#)

b) "engagements of Murray Belcher and Russell Trott as National Judicial Registrar and District Registrars in the FCA"; [52](#) and

c) "engagements of Rohan Muscat and Caitlin Wu to National Registrar positions in the FCA." [53](#)

[109] Ms McMullan stated:

The information the FCA provided included ... relevant gazettal information and ***a role review process that had resulted in certain positions being found suitable for either a Legal 2 or SESB1 position, depending on the relative complexity and work load in relevant registries.*** [54](#)

[110] In respect of the decisions to, respectively, “promote” Murray Belcher and Russell Trott to the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancies in the Queensland and Western Australia District Registries, Kate McMullan of the Australian Public Service Commission made the following finding:

I found no indication amongst the materials provided that Mr Belcher or Mr Trott were particularly targeted for reclassification of their roles. The evidence provided does not support a finding that this had occurred to create SESB1 positions for Ms O’Connor [amongst others] ... [55](#)

[111] Ms McMullan’s reasons for this finding are:

The material provided by FCA does indicate that Mr Belcher and Mr Trott applied for SESB1 positions and were ultimately placed into Legal 2 positions. However material provided by FCA also indicates that, ***following the advertisement of these positions and the finalisation of the recruitment process, a role review was undertaken*** ... The evidence provided indicates that as a result of a role review, a determination was made that NJR positions could be held at the SESB1 level in some registrars, and at the Legal 2 level in other registrars.

The material provided about this review indicates that ***these decisions were made on the basis of the relative volume and work undertaken in the various registrars (sic).*** [56](#)

[112] The *Australian Public Service Classification Guide* was issued by the Australian Public Service Commissioner in furtherance of his statutory functions to, among other things:

a) strengthen the professionalism of the Australian Public Service and facilitate continuous improvement in workforce management; [57](#)

b) uphold high standards of integrity and conduct in the Australian Public Service; [58](#) and

c) develop, review and evaluate workforce management policies and practices. [59](#)

[113] There can be no doubt that the instructions contained therein are the product of a lawful exercise of power on the parts of the Australian Public Service Commissioner.

[114] The Australian Public Service Commissioner has unambiguously instructed, in the *Australian Public Service Classification Guide*, that the classification of role “should be determined based on the complexity and responsibility of tasks involved, [and] not the number of tasks or how busy the role is.”[60](#)

[115] Moreover, the Australian Public Service Commissioner has unambiguously instructed, in the *Australian Public Service Classification Guide*, that:

The appropriate classification of a job should be determined based on the complexity and responsibility of tasks involved, not the number of tasks or how busy the role is. Work volume may influence the number of employees needed to perform the duties. [61](#)

[116] If that isn’t enough, the Australian Public Service Commissioner has unambiguously and **forcefully** instructed, in the section setting out the role evaluation principles in the *Australian Public Service Classification Guide*, “**[d]o not classify a job on the basis of the workload or how busy it is.**”[62](#)

[117] According to subsection 13(11) of the *Public Service Act 1999* (Cth), APS employees are, at all times, required to behave in a way that upholds:

a) the APS Values and APS Employment principles, and

b) the integrity and good reputation of the employee’s agency and the APS.

[118] One of the APS Values pertains to ethics. Subsection 10(2) of the *Public Service Act 1999* (Cth) provides:

The APS demonstrates leadership, is trustworthy, and acts with integrity, in all that it does.

[119] Under s 11 of the *Public Service Act 1999* (Cth), the Australian Public Service Commissioner is empowered to issue directions, in writing, in relation to the APS Values for the purposes of:

- a) ensuring that the APS incorporates and upholds the APS Values; and
- b) determining, where necessary, the scope or application of the APS Values.

[120] Section 14 in the *Australian Public Service Commissioner's Directions 2016* (Cth) (and the revised *Australian Public Service Commissioner's Directions 2022* (Cth)) provides:

Having regard to an individual's duties and responsibilities, upholding the APS Value in subsection 10(2) of the Act requires the following:

...

(e) acting in a way that is right and proper, as well as technically and legally correct or preferable.

[121] In other words, while the instructions contained in the *Australian Public Service Classification Guide* are not set out in a legislative instrument, the legal obligation to comply with the instructions set out in the *Australian Public Service Classification Guide*, which has been issued pursuant to the statutory functions of the Australian Public Service Commissioner to:

- a) strengthen the professionalism of the Australian Public Service and facilitate continuous improvement in workforce management; [63](#)
- b) uphold high standards of integrity and conduct in the Australian Public Service; [64](#) and

c) develop, review and evaluate workforce management policies and practices, [65](#)

is set out in the *Australian Public Service Commissioner's Directions 2016* (Cth).

[122] No person could reasonably argue that it is ever “right and proper, as well as technically and legally correct or preferable” to ignore, wholesale, the instructions of the Australian Public Service Commissioner that have been issued to:

a) strengthen the professionalism of the Australian Public Service and facilitate continuous improvement in workforce management; [66](#)

b) uphold high standards of integrity and conduct in the Australian Public Service; [67](#) and

c) develop, review and evaluate workforce management policies and practices. [68](#)

[123] Despite:

a) the unambiguous and forceful instructions contained in the *Australian Public Service Classification Guide*; and

b) the fact that no reasonable person could contend that it is ever right and proper, as well as technically and legally correct or preferable, to classify (or reclassify) a role based on “how busy the role is” or, as Kate McMullan put it, “**on the basis of the relative volume ... of work undertaken in the various registrars (sic)**”, because, as the *Australian Public Service Classification Guide* provides, while “[w]ork volume may influence the number of employees needed to perform the duties”, [69](#) it has no bearing on the “appropriate classification of a job”, which “should be determined based on the complexity and responsibility of tasks involved, not the number of tasks or how busy the role is”, [70](#)

Mark Anstey chose to ignore the lawful, unambiguous and forceful instructions of (to adopt the terminology used in his letter of decision) the principal officer of the “agency with policy

responsibility in this area”, ignore the patent errors on the face of Kate McMullan’s public interest disclosure investigation report, and ignore the terms and thrust of my complaint of 26 October 2021.

[124] Instead, Mark Anstey decided to:

a) secretly solicit advice from the agency he was investigating;

b) withhold information of the *nature and content* of the advice that was *adverse to my interests in having the disclosable conduct that I reported in a public interest disclosure being “properly investigated and dealt with”*,<sup>71</sup> in contravention of the High Court of Australia’s unanimous judgment in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152;

c) deny me my lawful right to rebut or qualify further information, and comment by way of submission, upon the irrelevant advice that was adverse to my interests, which he solicited from the Australian Public Service Commission and adopted as determinative of the issues before Mr Anstey in relation to the recruitment of Rohan Muscat to fill a National Registrar vacancy because the Australian Public Service Commission is “the agency with policy responsibility in [the] area [of merit-based selection processes]”;<sup>72</sup>

d) denied me my entitlement to be advised of any adverse conclusion that has been arrived at on the basis of the advice that was secretly solicited.<sup>73</sup>

[125] In other words, Mark Anstey decided to adopt, holus-bolus, the secret advice of the Australian Public Service Commission, the agency he was investigating and, according to him, the “agency with policy responsibility in [the] area [of merit-based selection processes]” as well as workforce management practices in the Australian Public Service, while choosing to ignore the lawful instructions of the principal officer of the Australian Public Service Commissioner whose statutory functions include:

a) strengthen the professionalism of the Australian Public Service and facilitate continuous improvement in workforce management;<sup>74</sup>

b) uphold high standards of integrity and conduct in the Australian Public Service; <sup>75</sup> and

c) develop, review and evaluate workforce management policies and practices, <sup>76</sup>

even though:

d) the advice solicited was, as demonstrated in part VI, irrelevant to the issue at hand (i.e. whether the members of the selection committee convened to select candidates for the National Registrar vacancy (Sia Lagos, David Pringle and Andrea Jarratt) selected the candidates on the basis of merit, which included conducting a competitive selection process to determine the relative suitability of candidates, who applied to fill the National Registrar vacancy, to perform the relevant duties of a National Registrar in the Federal Court); and

e) the lawful instructions of the Australian Public Service Commissioner, set out in the *Australian Public Service Classification Guide*, were relevant to, and demonstrative of, the fundamental error made by Kate McMullan, being that it is against the lawful instructions of the principal officer of the agency she worked for, the Australian Public Service Commission, to classify, or reclassify, a role based on “how busy the role is” because while “[w]ork volume may influence the number of employees needed to perform the duties”, <sup>77</sup> it has no bearing on the “appropriate classification of a job”, which “should be determined based on the complexity and responsibility of tasks involved, **not** the number of tasks or **how busy the role is.**” <sup>78</sup>

[126] There is no consistency or coherence in Mark Anstey’s decision or his approach to assessing and adopting information from the Australian Public Service Commission.

[127] The fact that Mr Anstey was, in the light of policy set out in the *Australian Public Service Classification Guide*, prepared, on the basis of the selective adoption of information issued from the Australian Public Service Commission, to claim that Ms McMullan’s finding that a “decision to reclassify these positions was made *on the basis of the relative volume and complexity of work undertaken in the various registrars (sic)*”, being a “key finding”, was “not unreasonable for the Investigating Agency to make” demonstrates Mr Anstey’s abject incompetence (or worse, his deliberate decision to sweep a complaint about the patent inadequacy of Kate McMullan’s public interest disclosure investigation under the carpet by selectively adopting information as determinative of the issues before him, regardless of the cogency, probativity or relevance of that information to the issues at hand).

## **IX – GENERAL GROUND OF REVIEW – IGNORING GROUNDS OF COMPLAINT**

Ignoring complaint about Kate McMullan's failure to comply with mandatory procedural requirements under paragraph 53(5)(b) of the *Public Interest Disclosure Act 2013* (Cth)

[128] In my correspondence of 26 October 2021, I set out several grounds of complaint.

[129] One of those grounds of complaint was that Kate McMullan had failed to comply with procedures established under subsection 15(3) of the *Public Service Act 1999* (Cth) in investigating alleged breaches of the Code of Conduct, and had thus failed to comply with paragraph 53(5)(b) of the *Public Interest Disclosure Act 2013* (Cth).<sup>79</sup> Paragraph 53(5)(b) of the *Public Interest Disclosure Act 2013* (Cth) sets out a mandatory legal obligation. A failure to comply with it is a contravention of the *Public Interest Disclosure Act 2013* (Cth).

[130] Nonetheless, Mark Anstey saw it fit to ignore my well articulated complaint about Kate McMullan's failure to comply with mandatory procedural requirement in respect of conducting a public interest disclosure investigation into allegations of contraventions of the Code of Conduct.

Ignoring complaint about Kate McMullan's failure to adequately investigate allegations of misconduct in relation to the recruitment of Murray Belcher and Russell Trott

[131] According to part 2.7.7.1 of the *Agency Guide to the Public Interest Disclosure Act 2013* (Version 2), even though the *Public Interest Disclosure Act 2013* (Cth) "does not define when an investigation or action taken by an agency as a result of the investigation is inadequate ... an investigation is likely to be considered inadequate if information that was reasonably available, relevant and materially significant was not obtained."

[132] Moreover, and in the same part of the *Agency Guide to the Public Interest Disclosure Act 2013* (Version 2), the following is noted:

[s]ome pitfalls for agencies to avoid when investigating a disclosure include ... not pursuing obvious lines of enquiry (sic).

[133] In my correspondence of 26 October 2021, I set out several grounds of complaint.

[134] One of those grounds of complaint was that Kate McMullan had failed to contact, as part of her duty to investigate, people involved in the alleged misconduct associated with the recruitment processes for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancies in the Queensland and Western Australia District Registries of the Federal Court of Australia. The relevant grounds of complaint were set out in parts 8.5.2.2 and 8.5.2.4 of the complaint documents provided to the Office of the Commonwealth Ombudsman on 26 October 2021.

[135] In essence, Kate McMullan found that:

a) “no ‘veto power’ was exercised or purported to be exercised by the Australian Public Service Commissioner’s representative on the selection panel”; [80](#) and

b) “it is not clear whether or for what purpose Mr Soden may have made representations that the Australian Public Service Commissioner’s representative on the selection panel had exercised a ‘veto power’”, but “in absence of a ‘veto power’ being exercised or being purported to be exercised, any incorrect statement by Mr Soden ... about action taken by the Australian Public Service Commissioner’s representative on the selection panel would not in and of itself constitute disclosable conduct”, [81](#)

even though Kate McMullan did not contact: [82](#)

c) Kerryn Vine-Camp, the Australian Public Service Commissioner’s representative and the person Warwick Soden alleged had threatened to exercise, and effectively exercised, a power of veto over the selection process for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in Queensland;

d) Justice Greenwood, the person to whom Warwick Soden relayed his claims about Kerryn Vine-Camp threatening to exercise, and exercising, a power of veto over the selection process for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in Queensland;

e) Warwick Soden, the person who claimed that Kerryn Vine-Camp had threatened to exercise, and effectively exercised, a power of veto over the selection process for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in Queensland;

f) Murray Belcher, the person who was denied lawful career progression to the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in Queensland so that the scarce Senior Executive Band 1 classification that should have been allocated to him under rule 6 of the *Public Service Classification Rules 2000* (Cth) could be “transferred to Sydney” and allocated to either Susan O’Connor or Drew Pearson, people who had not applied for any Senior Executive Band 1 classified vacancies;

g) Russell Trott, the person who was denied lawful career progression to the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in Western Australia so that the scarce Senior Executive Band 1 classification that should have been allocated to him under rule 6 of the *Public Service Classification Rules 2000* (Cth) could be “transferred to Sydney” and allocated to either Susan O’Connor or Drew Pearson, people who had not applied for any Senior Executive Band 1 classified vacancies;

h) David Pringle, a member of the selection committees assembled to consider the candidates for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancies in Queensland and Western Australia, and one of the people who selected, respectively, Murray Belcher and Russell Trott as the recommended candidates for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancies in Queensland and Western Australia;

i) Andrea Jarratt, a member of the selection committees assembled to consider the candidates for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancies in Queensland and Western Australia, and one of the people who selected, respectively, Murray Belcher and Russell Trott as the recommended candidates for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancies in Queensland and Western Australia; and

j) Darrin Moy, the head of the human resources department who assisted in giving effect to the conspiracy to deny both Murray Belcher and Russell Trott lawful career progression to the Senior Executive Service of the Australian Public Service.

[136] Apparently, Kate McMullan’s findings, which were based on her decision not to interview:

a) those alleged to have contravened the Code of Conduct set out in section 13 of the *Public Service Act 1999* (Cth); or

b) those affected by those contraventions,

(i.e. were based on no evidence at all) were, to quote Mark Anstey, “key findings [that] were not unreasonable for the Investigating Agency to make.”

[137] What findings? Kate McMullan shamelessly and explicitly refused to obtain information that was reasonably available, relevant and materially significant to the allegations of misconduct. But in Mark Anstey’s demented melon, it follows that it was perfectly legitimate to ignore the well articulated grounds of complaint about Kate McMullan’s failure to comply with her duty to ***investigate*** the allegations of contraventions of the Code of Conduct. You don’t have to have a PhD in analytical philosophy to recognise the ineptitude manifested in Mark Anstey’s process of “reasoning” (I use the word in the loosest sense).

## **X – GENERAL GROUND OF REVIEW – RELEVANT STANDARDS THAT APPLY TO INVESTIGATIONS CONDUCTED BY THE OMBUDSMAN**

[138] In his record of decision, Mr Anstey states: [83](#)

Our investigation is also not a reinvestigation of your disclosure. Rather, our investigation of a complaint of this kind focuses on the actions the agency took to investigate and finalise a PID, and whether those actions met the requirements of the PID Act and the Public Interest Disclosure Standard 2013 (PID Standard).

[139] That is one of the only statements, if not the only statement, in his letter of decision that is correct.

[140] But then Mr Anstey goes on to state: [84](#)

In my view, while the internal record keeping could have been more robust and the PID report could have contained further detail about the investigation undertaken and the evidence considered, I cannot conclude that the findings of the PID Investigator were clearly unreasonable.

In these circumstances, I have decided that further investigation is not warranted, and the investigation of your complaint is now finalised.

[141] The relevant standard of review is not “I cannot conclude that the findings of the PID Investigator were clearly unreasonable.”

[142] Intervention does not depend on the findings of the PID investigator being “clearly unreasonable”. Importing standards of judicial review (and the particularly onerous standard of “clear unreasonability”) to intervene is unwarranted in the light of the provisions of the Ombudsman Act 1976 (Cth). The Ombudsman’s role is to consider the way in which an administrative decision was handled and make recommendations where the process was deficient.

[143] By his own admission, Mr Anstey has stated that the process was deficient because the process was not properly recorded and, despite the fact that Mr Anstey interviewed Kate McMullan, the original decision maker, he was unable to make “findings” “either way” as to whether Ms McMullan even considered the substance of the internal disclosure.

## **XI – GENERAL GROUND OF REVIEW – THE LOGICAL COHERENCE OF MR ANSTEY’S STATEMENTS AS TO REVIEWABILITY**

[144] In his record of decision, Mr Anstey states: [85](#)

Our investigation is also not a reinvestigation of your disclosure. Rather, our investigation of a complaint of this kind focuses on the actions the agency took to investigate and finalise a PID, and whether those actions met the requirements of the PID Act and the Public Interest Disclosure Standard 2013 (PID Standard).

[145] That is one of the only statements, if not the only statement, in his letter of decision that is correct.

[146] But then Mr Anstey goes on to state: [86](#)

In my view, while the internal record keeping could have been more robust and the PID report could have contained further detail about the investigation undertaken and the evidence considered, I cannot conclude that the findings of the PID Investigator were clearly unreasonable.

[147] Mr Anstey could not possibly draw such a conclusion because he repeatedly notes that there are insufficient records upon which to make findings.

[148] For example, he states: [87](#)

In my view, the PID Investigator did not create adequate investigation records for this matter or, alternatively, the Investigating Agency did not maintain relevant records.

[149] He also states: [88](#)

Due to insufficient investigation records having been retained by the Investigating agency we cannot confirm the PID Investigator identified and considered if there had been a failure to advertise in NSW for the SES1 appointment that was subsequently made in NSW.

[150] He also states: [89](#)

You raised concern a finding was made that the agency breached the Code of Conduct and individual findings were not made. You asserted the finding the agency engaged in disclosable conduct arguably carried with it an implication that certain officers may have engaged in disclosable conduct. The investigation report does not demonstrate the PID Investigator turned their mind to this question and, due to insufficient investigation records having been retained by the Investigating agency, we are unable to form a view either way that the PID Investigator sufficiently considered this issue.

[151] He also states: [90](#)

I note your view the alleged favouritism shown to that appointee was first present during the shortlisting process. The investigation report does not demonstrate the PID Investigator turned their mind to this question and, due to insufficient investigation records having been retained by the Investigating agency, we are unable to form a view either way that the PID Investigator sufficiently considered the shortlisting process itself as part of the investigation of the PID.

[152] Mark Anstey's reasoning process is:

a) since "the PID Investigator did not create adequate investigation records for this matter or, alternatively, the Investigating Agency did not maintain relevant records"; and

b) "[d]ue to insufficient investigation records having been retained by the Investigating agency we cannot confirm the PID Investigator identified and considered if there had been a failure to advertise in NSW for the SES1 appointment that was subsequently made in NSW"; and

c) since "[t]he investigation report does not demonstrate the PID Investigator turned their mind to [the legal proposition that a Statutory Agency is incapable of contravening the Code of Conduct because the Code of Conduct applies to APS employees and, by virtue of section 14 of the Public Service Act 1999 (Cth), Agency Heads and Statutory Office Holders, even though Ms McMullan held that the Federal Court of Australia Statutory Agency contravened the APS Employment Principles when the Agency, rather than those constituting the selection committee, selected an unmeritorious female candidate ahead of candidates, all of whom met the selection criteria for the role] and, due to insufficient investigation records having been retained by the Investigating agency, we are unable to form a view either way that the PID Investigator sufficiently considered this issue"; and

d) since "[t]he investigation report does not demonstrate the PID Investigator turned their mind to [the issues of favouritism demonstrated to the male candidate, and patronage] and, due to insufficient investigation records having been retained by the Investigating agency, we are unable to form a view either way that the PID Investigator sufficiently considered the shortlisting process itself as part of the investigation of the PID",

therefore "I cannot conclude that the findings of the PID Investigator were clearly unreasonable."

[153] In other words, Mark Anstey has found that there are no records of evidence upon which to base findings in respect of the identified issues yet, in the absence of evidence, he concludes “I cannot conclude that the findings of the PID Investigator were clearly unreasonable.”

[154] In the light of his investigative duties, the reasoning process is that of a certifiable moron. Mark Anstey’s ineptitude is manifest on the face of the record.

## **XII – GENERAL GROUND OF COMPLAINT – 412 DAYS TO NOTIFY ME THAT “BECAUSE THE PID ACT DOES NOT PROVIDE A MECHANISM FOR A FINALISED PID INVESTIGATION TO BE REOPENED”, THE INVESTIGATION UNDER THE OMBUDSMAN ACT MUST BE TERMINATED**

[155] You will notice that it took Mark Anstey 412 days, from the date I made my complaint, to notify me that, *as a matter of law and independent of the facts of my complaint*, since “the PID Act does not provide a mechanism for a finalised PID investigation to be reopened” the Commonwealth Ombudsman “cannot take any action that would cause an agency to reinvestigate a PID”.

[156] Assuming Mr Anstey’s statement as to the law is correct, that was the beginning and the end of the matter. The rest of his decision letter is inconsequential because, according to Mark Anstey, ever since the *Public Interest Disclosure Act 2013* (Cth) was passed by the Parliament, right or wrong, deficient, inadequate or otherwise, once a public interest disclosure investigation was finalised, *as a matter of law and independent of the facts of any complaint*, there was simply no “mechanism for a finalised PID investigation to be reopened”; a deficient or inadequate or unlawful investigation was final and binding as *a matter of law*.

[157] According to Mark Anstey, since, *as a matter of law and independent of the facts of my complaint*, “the PID Act does not provide a mechanism for a finalised PID investigation to be reopened”, and since, *as a matter of law and independent of the facts of my complaint*, the Commonwealth Ombudsman “cannot take any action that would cause an agency to reinvestigate a PID”, he was compelled to terminate (presumably under section 12 of the *Ombudsman Act 1976* (Cth)) the investigation because “there is no practical outcome [the Ombudsman] could obtain by further investigating the complaint.”

[158] Why did it take 412 days, from the date the complaint was made, for Mark Anstey to communicate this (erroneous) view on the law, *which was independent of the facts of my complaint*?

[159] Am I to understand that it is standard practice for an official in the Office of the Commonwealth Ombudsman to faff around for 412 days before notifying complainants that, *as a matter of law and independent of the facts of any complaint*, it is impossible to reinvestigate disclosable conduct that was the subject of an initial and finalised investigation?

[160] That is disgusting.

## **XIII – SPECIFIED GROUNDS OF REVIEW**

[161] The following grounds of review are specific to the recruitment exercises for ten registrars of the Federal Court.

[162] References to Annexures EDR – 1 through to EDR – 135 should be familiar to staff members in the Public Interest Disclosure team because I provided those annexures to the Office of the Commonwealth Ombudsman on 26 October 2021, in support of the complaint that I submitted. I will, thus, not attach them to this email. Moreover, the fact that Mr Anstey had access to those items of supporting evidence should drive home the fact that despite having access to all the evidence he needed to make a lawful decision, Mr Anstey ignored the evidence and made a decision that, in practical terms, exculpated Ms McMullan and the Australian Public Service Commission for an inadequate public interest disclosure investigation.

### **1. THE DECISION TO PROMOTE CAITLIN WU**

#### Allegation

[163] In essence, I alleged that officials in the Federal Court of Australia Statutory Agency promoted a candidate to the position of National Court Framework Registrar in contravention of their duty, under the Code of Conduct, to at all times behave in a way that uphold the APS Employment Principles, which includes making decisions relating to engagement and promotion based on merit.

### Salient facts

[164] An Executive Level 1 classified National Court Framework Registrar vacancy was notified in the Public Service Gazette.<sup>91</sup> The following essential criterion was noted in the “Formal Qualifications” section: “The position requires the occupant to perform statutory legal function (sic), as required. Therefore, legal qualifications and admission as a practitioner of the High Court or the Supreme Court of a State or Territory is (sic) essential.”

[165] A selection committee consisting of Sia Lagos, the current Chief Executive Officer and Principal Registrar of the Federal Court, David Pringle, the current Chief Executive Officer and Principal Registrar of Division 1 of the Federal Circuit and Family Court, and Andrea Jarratt, the current Director of National Operations in the Federal Court, selected Caitlin Wu on 2 December 2016 for promotion to the National Court Framework Registrar role.<sup>92</sup>

[166] On 2 December 2016, Sia Lagos, as the then Agency Head’s delegate, endorsed the decision of the selection committee to select Caitline Wu for promotion to the National Court Framework Registrar role.<sup>93</sup>

[167] On 5 December 2016, Andrea Jarratt provided Caitlin Wu with a written contract of employment setting out the terms of her promotion to the Executive Level 1 classified National Court Framework Registrar role,<sup>94</sup> and Caitlin Wu signed and dated that documents on the same date.<sup>95</sup>

### Findings and outcomes of Kate McMullan’s investigation under the *Public Interest Disclosure Act 2013* (Cth)

1. [168] The investigator, Kate McMullan, found “on the balance of probabilities that Caitlin Wu did not hold an essential qualification for the position and no reasonable efforts were made throughout the selection process to determine whether she was eligible to be admitted to practice.”<sup>96</sup>
- 2.
3. [169] The investigator, Kate McMullan, “found on the balance of probabilities that the recruitment process that ultimately led to the FCA promoting Caitlin Wu into [the National Court Framework Registrar] position did not have (sic) comply with the APS Employment Principles under s 10A(2) of the [Public Service] Act ...”<sup>97</sup>
- 4.

5. [170] The investigator found, among other things, that “a candidate who did not meet an essential requirement of the role was engaged over numerous candidates who did meet this criteria (sic).”<sup>98</sup>
- 6.
7. [171] In response to her “adverse findings concerning the recruitment practices of the FCA”, the PID Investigator recommended that: <sup>99</sup>

a) “staff at the FCA be provided with guidance and / or training about the APS Employment Principles prior to undertaking any recruitment action, to prevent further incidents of this nature”; and

b) “relevant FCA staff members familiarise themselves with the APS Code of Conduct, and in particular paragraph 13(11)(a) of the [Public Service] Act, which states, relevantly, that employees must at all times behave in a way that upholds the APS Employment Principles.”

Errors alleged to have been committed by the investigator in complaint lodged with the Office of the Commonwealth Ombudsman on 26 October 2021

[172] First, I noted that the investigator had committed a legal error in finding that the “FCA” had failed to “comply with the APS Employment Principles under s 10A(2) of the [Public Service] Act.” <sup>100</sup> I took “FCA” to mean the Federal Court of Australia Statutory Agency. <sup>101</sup>

[173] I noted that the relevant allegation was that there had been a contravention of the Code of Conduct – specifically, the duty to at all times behave in a way that uphold the APS Employment Principles, which includes making decisions relating to engagement and promotion based on merit. I noted that the duty to comply with the Code of Conduct was a duty held by APS employees and, by virtue of section 14 of the *Public Service Act 1999* (Cth), by agency heads and statutory office holders. The discloser noted that statutory agencies, such as the Federal Court of Australia Statutory Agency, are not capable of contravening the Code of Conduct because the Code of Conduct does not bind statutory agencies. Accordingly, the finding that the “FCA” had failed to “comply with the APS Employment Principles under s 10A(2) of the [Public Service] Act” was without statutory basis, and that Kate McMullan’s finding was vitiated by this error. <sup>102</sup>

[174] Second, and relating to the first point, I stated that the appropriate conclusion to draw, on the basis of the finding that “a candidate who did not meet an essential requirement of the role was engaged over numerous candidates who did meet this criteria”, would be that the APS employees who did promote Caitlin Wu had contravened their duty to at all times behave in a way that upholds the APS Employment Principles, which includes making decisions relating to engagement and promotion based on merit. <sup>103</sup>

[175] Third, I noted that, based on the report of the investigation, it appeared that the investigator had failed to comply with procedures established under subsection 15(3) of the *Public Service Act 1999* (Cth) in investigating alleged breaches of the Code of Conduct, and had thus failed to comply with paragraph 53(5)(b) of the *Public Interest Disclosure Act 2013* (Cth). [104](#)

[176] Fourth, I noted that Kate McMullan's response to the serious finding that amounted to Caitlin Wu not being promoted on the basis of merit, which consisted of training exercises for members of staff in the Federal Court of Australia Statutory Agency, was, in the light of the single standard of behaviour that applies in the Australian Public Service, inappropriate. [105](#) I also questioned if a member of the rank and file of the Australian Public Service would have been treated so leniently if they had been found to have promoted a person on anything other than the basis of merit. [106](#)

#### Findings and outcomes of the investigation conducted by Mark Anstey of the Office of the Commonwealth Ombudsman

[177] On 12 December 2022, Mark Anstey, an acting Assistant Director in the Public Interest Disclosure Team of the Ombudsman's Office, terminated an investigation, under the *Ombudsman Act 1976* (Cth), into the errors alleged to have been committed by Ms McMullan. [107](#)

[178] Mr Anstey claimed that the Ombudsman "cannot take any action that would cause an agency to reinvestigate a [public interest disclosure] ... because the [Public Interest Disclosure Act 2013 (Cth)] does not provide a mechanism for a finalised PID investigation to be reopened." [108](#) The falsehood of that legal proposition has been part IV of this email.

[179] Mr Anstey claimed "most of the key findings were not unreasonable for the investigating agency to make." [109](#) That proposition is false, not least for the reasons set out in part XI of this email. Further reasons demonstrating the falsehood of that proposition will be set out below.

[180] Mr Anstey concluded that "there is no practical outcome [the Ombudsman] could obtain by further investigating the complaint", which, as I have demonstrated in part V of this email, is a falsehood, and, on that basis, terminated the investigation into the errors alleged to have been committed by Ms McMullan. [110](#)

[181] In terminating the investigation, Mr Anstey stated:

You raised concern a finding was made that the agency breached the Code of Conduct and individual findings were not made. You asserted the finding the agency engaged in disclosable conduct arguably carried with it an implication that certain officers may have engaged in disclosable conduct. The investigation report does not demonstrate the PID Investigator turned their mind to this question and, due to insufficient investigation records having been retained by the Investigating agency, we are unable to form a view either way that the PID Investigator sufficiently considered this issue. We will be providing feedback to the agency on these points.

### *Ground 1*

[182] I challenge the pertinence of Mr Anstey's findings on the grounds of error in Ms McMullan's investigation report.

[183] Mr Anstey had noted that:

a) I had "raised concern a finding was made that the agency breached the Code of Conduct and individual findings were not made"; [111](#) and

b) "[t]he investigation report does not demonstrate the PID Investigator turned their mind to this question and, due to insufficient investigation records having been retained by the Investigating agency, we are unable to form a view either way that the PID Investigator sufficiently considered this issue". [112](#)

[184] Whether or not Ms McMullan had turned her mind to the propriety of finding that the "FCA" had failed to "comply with the APS Employment Principles under s 10A(2) of the [Public Service] Act ..." was irrelevant.

[185] The relevant issue is that Ms McMullan has misapprehended the law and, on the basis of that misapprehension, made an impermissible finding. That Ms McMullan has misapprehended the law is manifest on the face of her investigation report. Mr Anstey's task was not to determine whether or not Ms McMullan had turned her mind to the propriety of finding that the "FCA" had failed to "comply with the APS Employment Principles under s 10A(2) of the [Public Service] Act ...", but to determine whether it was permissible for Ms McMullan to find that a statutory agency is, as a matter of law, capable of contravening the Code of Conduct – specifically, the duty to at all times behave in a

way that upheld the APS Employment Principles – because the statutory agency failed to “comply with the APS Employment Principles under s 10A(2) of the [Public Service] Act.”

[186] It is not, for the reasons set out in part 5.5.1 of the complaint document submitted to the Office of the Commonwealth Ombudsman on 26 October 2021.

[187] Mr Anstey’s comments are bewildering and make manifest the processes of a confused and ill-informed mind.

### *Ground 2*

[188] Despite the fact that I raised it as an explicit ground of complaint, [113](#) Mr Anstey did not address my complaint that Ms McMullan had failed to comply with procedures established under subsection 15(3) of the *Public Service Act 1999* (Cth) in investigating alleged breaches of the Code of Conduct, and had thus failed to comply with paragraph 53(5)(b) of the *Public Interest Disclosure Act 2013* (Cth). Ms McMullan’s failure to comply with mandatory procedural requirements was a serious failure, and cannot be dismissed without reason.

[189] Mr Anstey’s failure to address my complaint, by ignoring it, is unacceptable and demonstrates just careless and superficial a job Mark Anstey did in conducting his “investigation” under the *Ombudsman Act 1976* (Cth).

### *Ground 3*

[190] Despite the fact that I raised it as an explicit ground of complaint, [114](#) Mr Anstey failed to address the adequacy of Ms McMullan’s response to the serious finding that amounted to Caitlin Wu not being promoted on the basis of merit. The inadequacy was serious and cannot be dismissed without reason.

[191] Mr Anstey’s failure to address my complaint, by ignoring it, is unacceptable and demonstrates just how careless and superficial a job Mark Anstey did in conducting his “investigation” under the *Ombudsman Act 1976* (Cth).

### Relief requested

[192] I request that:

- a) Mr Anstey's decision to terminate the investigation under the *Ombudsman Act 1976* (Cth) be set aside;
- b) the investigation under the *Ombudsman Act 1976* (Cth) be completed according to law;
- c) the Ombudsman make a finding that Kate McMullan's investigation of the public interest disclosure relating to the decision to promote Caitlin Wu was inadequate because the finding that the "FCA" had failed to "comply with the APS Employment Principles under s 10A(2) of the [Public Service] Act ..." was not open to Ms McMullan to make;
- d) the Ombudsman make a finding that Kate McMullan failed to comply with procedures established under subsection 15(3) of the *Public Service Act 1999* (Cth) in investigating alleged breaches of the Code of Conduct and had thus failed to comply with paragraph 53(5)(b) of the *Public Interest Disclosure Act 2013* (Cth);
- e) the Ombudsman make a finding that Ms McMullan's response to the serious finding that amounted to Caitlin Wu not being promoted on the basis of merit was inadequate;
- f) the Ombudsman refer the matter back to the Australian Public Service Commissioner with a recommendation that he reinvestigate the public interest disclosure according to law.

## **2. THE DECISION TO ENGAGE ROHAN MUSCAT**

### Allegations

[193] In essence, I alleged that officials in the Federal Court of Australia Statutory Agency engaged Rohan Muscat to fill the position of National Registrar in contravention of their duty, under the Code of Conduct, to at all times behave in a way that uphold the APS Employment Principles, which includes making decisions relating to engagement and promotion based on merit.

[194] I also alleged that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct by withholding material information from the heads of jurisdiction when soliciting instruments directing Rohan Muscat to exercise the judicial power of the Commonwealth as invested in the Federal Court and Federal Circuit Court.

### Salient facts

[195] An Executive Level 1 classified National Registrar vacancy was notified in the Public Service Gazette.<sup>115</sup> The following essential criterion is noted in the “Formal Qualifications” section: “This position may require the occupant to perform statutory legal functions (sic), as necessary. Therefore, legal qualifications and admission as a practitioner of the High Court and/or the Supreme Court of a State or Territory is (sic) essential.” The vacancy notification refers to a position description for the vacancy.

[196] A position description for the Executive Level 1 classified National Registrar vacancy was published on the website of the Federal Court of Australia.<sup>116</sup> The following selection criterion is noted in the “Selection Criteria” section: “Experience in litigation and case management in superior courts of Australia.”

[197] At the time Rohan Muscat applied for the National Registrar vacancy on 24 May 2018, Rohan Muscat worked as a Senior Legal Case Manager, providing “high level legal and policy support to Deputy Principal Judicial Registrar Pringle ...”<sup>117</sup>

[198] Mr Muscat graduated from high school in 2011, and graduated from university in 2017 with a law degree.<sup>118</sup>

[199] One of Mr Muscat’s two professional referees was David Pringle, the current Chief Executive Officer and Principal Registrar of Division 1 of the Federal Circuit and Family Court.<sup>119</sup>

[200] According to the selection report for the National Registrar role, 58 applications were received to fill a National Registrar vacancy. [120](#)

[201] A selection committee consisting of Sia Lagos, the current Chief Executive Officer and Principal Registrar of the Federal Court, David Pringle, the current Chief Executive Officer and Principal Registrar of Division 1 of the Federal Circuit and Family Court, and Andrea Jarratt, the current Director of National Operations in the Federal Court, selected Rohan Muscat as a “recommended candidate” for engagement on 5 October 2018. [121](#) Sia Lagos, David Pringle and Andrea Jarratt certified reading the selection report and agreeing with the contents of the report on 5 October 2018. [122](#) They also certified being “aware of the correct policy and procedures for merit selection and certify that these have been followed” on 5 October 2018. [123](#)

[202] On 5 October 2018, Sia Lagos, in her capacity as the then Agency Head’s delegate, endorsed the decision of the selection committee to engage Rohan Muscat into a National Registrar role. [124](#)

[203] Despite the fact that Sia Lagos endorsed the selection committee’s decision on 5 October 2018, Andrea Jarratt had on 7 September 2018, 28 days prior to Sia Lagos endorsing the selection committee’s decision, provided Rohan Muscat with a contract for a National Registrar role. [125](#) Rohan Muscat signed the contract on 19 September 2018. [126](#)

[204] On 5 October 2018, Rohan Muscat was still enrolled in a Practical Legal Training course and, thus, had not been admitted to the Supreme Court of a State or Territory, or to the High Court of Australia. [127](#)

[205] Mr Muscat was first admitted to the Supreme Court of a State or Territory on 8 February 2019. [128](#)

[206] On 27 February 2019, 19 days after Mr Muscat was first admitted to the Supreme Court of a State or Territory, Chief Justice Allsop issued an instrument directing Mr Muscat to exercise the judicial power of the Commonwealth, as invested in the Federal Court. Specifically, Chief Justice Allsop directed Mr Muscat to, among other powers, exercise: a) powers specified in paragraphs 35A(1)(a) – (g) of the *Federal Court of Australia Act 1976* (Cth); b) powers specified in Schedule 2 of the *Federal Court Rules 2011* (Cth); c) powers specified in Schedule 2 of the *Federal Court (Corporations) Rules 2000* (Cth); and d) powers specified in Schedule 1 of the *Federal Court (Bankruptcy) Rules 2016* (Cth). [129](#)

[207] On 26 February 2019, 18 days after Mr Muscat was first admitted to the Supreme Court of a State or Territory, Chief Judge Alstergren issued a set of instruments directing Mr Muscat to exercise the judicial power of the Commonwealth, as invested in the Federal Circuit Court. In the first instrument, Chief Judge Alstergren directed Mr Muscat to exercise powers in Schedule 1 of the *Federal Circuit Court (Bankruptcy) Rules 2016* (Cth).<sup>130</sup> In the second instrument, Chief Judge Alstergren directed Rohan Muscat to exercise various powers mentioned in the table to rule 20.00A of the *Federal Circuit Court Rules 2001* (Cth), with effect from 29 January 2019 (i.e. 10 days before Rohan Muscat was first admitted to the Supreme Court of a State or Territory).<sup>131</sup>

#### Findings and outcomes of Kate McMullan’s investigation under the *Public Interest Disclosure Act 2013* (Cth)

[208] The investigator, Kate McMullan, made several findings, but all other findings were dependent on a major premise, which was the following finding:

On the material provided by the FCA I find on the balance of probabilities that [Rohan Muscat] did not hold an essential requirement at the time of application. However given that [Rohan Muscat] had indicated that he would meet this qualification within a short period after application I do not find that the lack of essential requirement at the date of the application constitutes disclosable conduct within the meaning of the PID Act. I also find that disclosable conduct did not occur in respect of the decision to shortlist, interview and promote [Rohan Muscat] prior to [his admission to the Supreme Court] notwithstanding that this was listed as an essential qualification for the position.<sup>132</sup>

#### Errors alleged to have been committed by the investigator in complaint lodged with the Office of the Commonwealth Ombudsman on 26 October 2021

[209] First, Ms McMullan had committed a fallacy of reasoning.<sup>133</sup> Specifically:<sup>134</sup>

Ms McMullan’s claim that “the lack of essential requirement at the date of application [does not constitute] disclosable conduct within the meaning of the PID Act” is a classic straw man fallacy. Mr Muscat’s failure to meet an essential requirement to successfully fill vacancy NN 10725189 [i.e. a National Registrar vacancy] at the date he submitted his application was never an issue.

Every member of the public is at liberty to apply for a position in the Australian Public Service, regardless of whether they meet the criteria set out in respect of the relevant

position. Rohan Muscat was as much at liberty to apply to fill vacancy NN 10725189 as any other member of the public. The issue was not that Mr Muscat applied to fill a vacancy that he could not, on an objective assessment of his application, have filled. The issue was that the selection process was not applied fairly, by members of the selection panel convened to assess the candidates who had applied to fill vacancy NN 10725189, in relation to each eligible applicant.

[210] The relevant issue was that “**members of the selection panel**” had failed to, at all times, behave in a way that upheld the APS Employment Principles, which includes making decisions relating to engagement and promotion based on merit. [135](#)

[211] Second, the circumstances relating to Rohan Muscat’s selection were suspicious, particularly because Rohan Muscat had, 28 days before Sia Lagos, as the Agency Head’s delegate, endorsed the selection committee’s decision to select Mr Muscat to fill a National Registrar vacancy, been provided with his contract of engagement as a National Registrar by Andrea Jarratt. [136](#)

[212] Third, based on the report of the investigation, it appeared that the Ms McMullan had failed to comply with procedures established under subsection 15(3) of the *Public Service Act 1999* (Cth) in investigating alleged breaches of the Code of Conduct, and had thus failed to comply with an essential legal requirement set out in paragraph 53(5)(b) of the *Public Interest Disclosure Act 2013* (Cth). [137](#)

[213] Fourth, Kate McMullan had failed to address the allegation that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct by withholding material information from Chief Justice Allsop and Chief Judge Alstergren when soliciting instruments directing Rohan Muscat to exercise the judicial power of the Commonwealth as invested in the Federal Court and Federal Circuit Court. [138](#) Presumably, Ms McMullan’s failure to address the allegation that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct by withholding material information from Chief Justice Allsop and Chief Judge Alstergren was based on the following “finding”:

On the balance of probabilities, I do not find that any disclosable conduct occurred with respect to the recruitment process of Rohan Muscat. [139](#)

[214] For the sake of completeness, I also note that I addressed, in my complaint document submitted to the Office of the Commonwealth Ombudsman on 26 October 2021, all of Ms McMullan’s findings that were not on point or irrelevant because they were dependent on the straw man fallacy identified. [140](#)

Findings and outcomes of the investigation conducted by Mark Anstey of the Office of the Commonwealth Ombudsman

[215] On 12 December 2022, Mark Anstey, an acting Assistant Director in the Public Interest Disclosure Team of the Ombudsman's Office, terminated an investigation, under the *Ombudsman Act 1976* (Cth), into the errors alleged to have been committed by Ms McMullan. [141](#)

[216] Mr Anstey claimed that the Ombudsman "cannot take any action that would cause an agency to reinvestigate a [public interest disclosure] ... because the [Public Interest Disclosure Act 2013 (Cth)] does not provide a mechanism for a finalised PID investigation to be reopened." [142](#) The falsehood of that legal proposition has been part IV of this email.

[217] Mr Anstey claimed "most of the key findings were not unreasonable for the investigating agency to make." [143](#) That proposition is false, not least for the reasons set out in part XI of this email. Further reasons demonstrating the falsehood of that proposition will be set out below.

[218] Mr Anstey concluded that "there is no practical outcome [the Ombudsman] could obtain by further investigating the complaint", which, as I have demonstrated in part V of this email, is a falsehood, and, on that basis, terminated the investigation into the errors alleged to have been committed by Ms McMullan. [144](#)

[219] In terminating the investigation, Mr Anstey stated: [145](#)

You alleged one candidate's appointment was unmeritorious because the appointee did not possess one of the criteria listed as an essential requirement for the position. You maintained this position notwithstanding the fact the individual obtained this essential requirement within a short period of being appointed.

As part of this investigation we sought advice from the APSC in its capacity as the agency with policy responsibility in this area. The APSC, in this capacity, advised that an agency can appoint a person in these circumstances if there is a reasonable basis to conclude the person will meet essential criteria for the position within a short period.

While I appreciate that you may have a different view on this, the PID Investigator's finding that disclosable conduct did not occur aligns with the view of the agency with policy responsibility in this area.

I note your view the alleged favouritism shown to that appointee was first present during the shortlisting process. The investigation report does not demonstrate the PID Investigator turned their mind to this question and, due to insufficient investigation records having been retained by the Investigating agency, we are unable to form a view either way that the PID Investigator sufficiently considered the shortlisting process itself as part of the investigation of the PID. We will provide feedback to the Investigating Agency on these points.

#### Grounds of review in respect of the decision to terminate the Ombudsman's investigation

[220] Aside from the general grounds of review that apply, the grounds of review specific to Mr Anstey's decision in respect of the engagement of Rohan Muscat as a National Registrar, and in respect of the consequential acts of administrators in the Federal Court, are as follows:

- 1) Mr Anstey's claim that Ms McMullan made a "finding that disclosable conduct did not occur ..." is incorrect and, on at least two levels, Ms McMullan's actual finding – "the lack of (sic) essential requirement at the date of application [does not constitute] disclosable conduct with in the meaning of the PID Act" – is nonsense;
- 2) the Australian Public Service Commission's advice "that an agency can appoint a person in ... circumstances if there is a reasonable basis to conclude the person will meet essential criteria for the position within a short period" is not on point, and Mr Anstey's adoption of the advice is unjustifiable;
- 3) Mr Anstey's concession that "the investigation report does not demonstrate the PID Investigator turned their mind to [the question of favouritism shown to Rohan Muscat]" demonstrates the inadequacy of Ms McMullan's investigation;
- 4) Mr Anstey's failure to address Ms McMullan's failure to comply with mandatory procedural requirements in respect of her public interest disclosure investigation;

5) Mr Anstey's failure to address Ms McMullan's failure to investigate the allegation that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct by withholding material information from Chief Justice Allsop and Chief Judge Alstergren when soliciting instruments, presumably because Mr Anstey agreed with Ms McMullan's "finding that disclosable conduct did not occur ..."

### *Ground 1*

[221] Contrary to Mark Anstey claim, Ms McMullan had not found that "disclosable conduct did not occur." Kate McMullan's finding was that because "Rohan Muscat had indicated that he would meet [an essential] qualification within a short period after application ... the lack of (sic) essential requirement at the date of application [does not constitute] disclosable conduct with in the meaning of the PID Act." Mr Anstey has "shifted the goal posts" by claiming that Kate McMullan found that "disclosable conduct did not occur."

[222] Kate McMullan's finding that "the lack of (sic) essential requirement at the date of application [does not constitute] disclosable conduct with in the meaning of the PID Act" is nonsense on two levels.

[223] First, the conduct reported met the definition of disclosable conduct for the purposes of the *Public Interest Disclosure Act 2013* (Cth). Both:

a) the authorised officer in the Office of the Commonwealth Ombudsman who allocated the disclosure for investigation to the Australian Public Service Commission on 11 May 2020; and

b) Ms McMullan,

had proceeded on the basis that disclosable conduct had been reported.

[224] Among other things, disclosable conduct is defined as conduct engaged in by a public official, in connection with his or her position as a public official, that contravenes a law of the Commonwealth.<sup>[146](#)</sup>

[225] I draw your attention to the allegation made, which included the allegation that officials in the Federal Court of Australia Statutory Agency engaged a candidate to fill the position of National Registrar in contravention of their duty, under the Code of Conduct, to at all times behave in a way that uphold the APS Employment Principles, which includes making decisions relating to engagement and promotion based on merit. My duty was to provide an internal disclosure that included information that *tends to show, or I believe on reasonable grounds tends to show*, one or more instances of disclosable conduct. [147](#)

[226] The authorised officer, Elizabeth Bennet, who allocated the disclosure to the Australian Public Service Commission, was required by law to not to allocate the disclosure for handling by an agency if the authorised officer was satisfied, on reasonable grounds, that there was no reasonable basis on which the disclosure could be considered to be an internal disclosure. [148](#) Plainly, Elizabeth Bennet, the authorised officer in the Office of the Commonwealth Ombudsman who allocated the disclosure to the Australian Public Service Commission, was convinced that an internal disclosure had been made.

[227] I note the obligation of a principal officer of an agency to investigate a disclosure allocated to an agency, [149](#) and the discretion available to investigators under sections 48 and 49 of the *Public Interest Disclosure Act 2013* (Cth) not to investigate.

[228] Ms McMullan never exercised the discretionary powers available to her under section 48 and 49. Moreover, at no point did Ms McMullan provide notification, pursuant to paragraph 50(1)(b) of the *Public Interest Disclosure Act 2013* (Cth), that she had decided under section 48 or 49 not to investigate the disclosure, or not to investigate the disclosure further. On the contrary, Ms McMullan had, pursuant to paragraph 50(1)(a) of the *Public Interest Disclosure Act 2013* (Cth), informed me of her obligation to investigate the disclosure on 29 July 2020. [150](#)

[229] Given that Ms McMullan had informed me of her obligation to investigate the disclosure, it was not open to her to find that “the lack of (sic) essential requirement at the date of application [does not constitute] disclosable conduct with in the meaning of the PID Act.” Rather, Ms McMullan was obligated, in the light of the Briginshaw principles, to determine, on the balance of probabilities, whether the evidence supported or did not support a finding that officials in the Federal Court of Australia Statutory Agency engaged a candidate to the position of National Registrar in contravention of their duty, under the Code of Conduct, to at all times behave in a way that uphold the APS Employment Principles, which includes making decisions relating to engagement and promotion based on merit.

[230] It was obvious that, on the basis set out above, Ms McMullan’s claim that “the lack of (sic) essential requirement at the date of application [does not constitute] disclosable conduct with in the meaning of the PID Act” is nonsense.

[231] Second, Ms McMullan’s finding that “Rohan Muscat had indicated that he would meet [an essential] qualification within a short period after application ... the lack of (sic) essential requirement at the date of application [does not constitute] disclosable conduct with in the meaning of the PID Act” was vitiated by the fallacy that the disclosable conduct was that Rohan Muscat had applied to fill a vacancy with selection criteria that he did not meet.

[232] Ms McMullan’s finding that “the lack of (sic) essential requirement at the date of application [does not constitute] disclosable conduct with in the meaning of the PID Act” is nonsense because it does not address the allegation, which was that **officials** in the Federal Court of Australia Statutory Agency (i.e. Sia Lagos, David Pringle and Andrea Jarratt) **engaged a candidate to fill the position of National Registrar in contravention of their duty, under the Code of Conduct, to at all times behave in a way that uphold the APS Employment Principles, which includes making decisions relating to engagement and promotion based on merit.**

## *Ground 2*

[233] Mark Anstey solicited **advice** from the very agency he was investigating, which Mark Anstey adopted as determinative of the issues before him in relation to the recruitment of Rohan Muscat to fill a National Registrar vacancy. I have, in part VI of this email, addressed the fundamental legal errors made Mark Anstey in soliciting advice from the very agency he was investigating, and which he kept secret. I have also addressed the jurisdictional error (the most serious kind of error known in Australia’s system of administrative law) that Mark Anstey made by failing to disclose material information used to make an adverse decision in part VI of this email.

[234] I now turn to substance of the **advice** solicited from the Australian Public Service Commission, which Mark Anstey adopted as determinative of the issues before him in relation to the recruitment of Rohan Muscat to fill a National Registrar vacancy.

[235] The Australian Public Service Commission’s advice “that an agency can appoint a person in ... circumstances if there is a reasonable basis to conclude the person will meet essential criteria for the position within a short period” is not on point.

[236] The disclosable conduct was that officials in the Federal Court of Australia Statutory Agency engaged a candidate to the position of National Registrar in contravention of their duty, under the Code of Conduct, to at all times behave in a way that uphold the APS Employment Principles, which includes making decisions relating to engagement and promotion based on merit. [151](#)

[237] Decisions relating to engagement and promotion are based on merit when: [152](#)

a) an assessment is made of the relative suitability of the candidates to perform the relevant duties, using a competitive selection process; and

b) the assessment is based on the relationship between the candidates' work related qualities and the work related qualities genuinely required to perform the relevant duties; and

c) the assessment focuses on the relative capacity of the candidates to achieve outcomes related to the relevant duties; and

d) the assessment is the primary consideration in making the decision.

[238] To demonstrate why the decision to select was not one based on merit, I again draw your attention to the selection criteria for the National Registrar vacancy, the application of another candidate, Dr Natalie Cujes, and Mr Muscat's claims against the selection criteria. Of course, I need not only draw you attention to the application of Dr Natalie Cujes; Mr Anstey had access to no less than 50 applications from candidates, [153](#) all of whom met the formal qualifications for the National Registrar role and, thus, had superior claims to that role. I draw your attention to the application that Dr Natalie Cujes submitted because it is convenient to do so, and because I had already used it as an example in my complaint document of 26 October 2021, which demonstrates how Mark Anstey failed to engage competently with the complaint.

[239] The selection criteria for the National Registrar vacancy included "admission as a practitioner of the High Court and/or the Supreme Court of a State or Territory" [154](#) and "[e]xperience in litigation and case management in superior courts of Australia." [155](#)

[240] Dr Natalie Cujes: [156](#)

a) was admitted to practice in the Supreme Court of State or Territory, or the High Court, in 1994;

b) had, at the time she submitted her application for the National Registrar role, an unrestricted practising certificate and is a practitioner of considerable experience;

c) had held an appointment to the office of Deputy District Registrar in the Federal Court between 2000 and 2009;

d) is a recognised expert on the practice and procedure of the Federal Court and the Federal Circuit Court (currently Division 2 of the Federal Circuit and Family Court of Australia), having authored several works on the practice and procedure of those courts;

e) is an academic; and

f) has a PhD on case transfers between federal courts and consequent impacts on access to procedural justice.

[241] Rohan Muscat:

a) had not been admitted to the Supreme Court of a State or Territory, or the High Court, when selected by the selection committee, or when the selection committee's decision was endorsed by Sia Lagos on 5 October 2018; and

b) had not, and has never, practised as a lawyer.

[242] No reasonable person would or could conclude that the decision to engage Rohan Muscat ahead of Dr Natalie Cujes was based on merit because if a **competitive selection process** <sup>152</sup> had been conducted of the relative suitability of these two candidates to perform the relevant duties of a

National Registrar in the Federal Court, then Dr Natalie Cujes would be selected ahead of Rohan Muscat every single time.

[243] Even if we assume that the Australian Public Service Commission's advice "that an agency can appoint a person in ... circumstances if there is a reasonable basis to conclude the person will meet essential criteria for the position within a short period" is correct, it would only be applicable in a situation where every other candidate:

a) had not been admitted to the Supreme Court of a State or Territory, or the High Court; and

b) did not have experience in litigation and case management in superior courts of Australia,

and Rohan Muscat had superior claims to fill the vacancy ***relative to the other candidates***.

[244] The Australian Public Service Commission's advice "that an agency can appoint a person in ... circumstances if there is a reasonable basis to conclude the person will meet essential criteria for the position within a short period" was of no relevance in a situation where scores of candidates had superior claims to performing the relevant duties relative to Rohan Muscat's claims. [158](#)

[245] For Mr Anstey to suggest, in the light of the evidence, that it was legally permissible for members of the selection committee to:

a) ignore the relative suitability of other candidates to perform the relevant duties; and

b) select a candidate who did not have the attributes necessary, at the time of the selection process, to perform the relevant duties,

because the Australian Public Service Commission provided advice "that an agency can appoint a person in ... circumstances if there is a reasonable basis to conclude the person will meet essential criteria for the position within a short period" would be to, among other things, suggest that:

c) the explicit terms of an enactment of the Parliament (i.e. *Public Service Act 1999* (Cth), ss 10A(1)(c) and 10A(2)) yield to the irrelevant advice of “the agency with policy responsibility in this area”; and

d) it is legally permissible to make decisions to engage or promote candidates on a primary basis other than merit, as elaborated in subsection 10A(2) of the *Public Service Act 1999* (Cth).

[246] Mr Anstey’s reliance on the secret advice that he solicited is misguided, and his reasons are bewildering and plainly wrong. Mr Anstey’s claim that “most of the key findings were not unreasonable for the investigating agency to make”, to the extent that the claim applied to Ms McMullan’s finding that “the lack of (sic) essential requirement at the date of application [does not constitute] disclosable conduct with in the meaning of the PID Act”, is unjustifiable because the finding is vitiated by a fallacy.

[247] Mr Anstey decision reflects the confused and ill-informed state of his mind. He has no idea what he is doing.

### *Ground 3*

[248] Mr Anstey’s concession that “the investigation report does not demonstrate the PID Investigator turned their mind to [the question of favouritism shown to Rohan Muscat]” <sup>159</sup> demonstrates the inadequacy that the investigation that Ms McMullan conducted.

[249] The evidence before Ms McMullan clearly indicated that Rohan Muscat had been offered a contract of employment by Andrea Jarratt, <sup>160</sup> 28 days before Sia Lagos, as the Agency Head’s delegate, had endorsed the decision to select Mr Muscat to fill a National Registrar role. <sup>161</sup>

[250] The evidence before Ms McMullan clearly indicated that the members of the selection committee had selected Rohan Muscat ahead of other candidates even though Rohan Muscat’s application contained questionable claims in response to the selection criteria, including his risible claim, in response to his “[d]emonstrated knowledge of the Federal Court’s jurisdiction, practices and procedures”, that he had, as a paralegal, “first acquired a heightened understanding of the Federal Court’s jurisdiction and procedure, albeit in family law.” <sup>162</sup>

[251] In the light of the evidence, no reasonable person could conclude that Ms McMullan's investigation was adequate, or that her response to the investigation she conducted was adequate. Nonetheless, and despite acknowledging that the "investigation report does not demonstrate the PID Investigator turned their mind to [the question of favouritism shown to Rohan Muscat]", <sup>163</sup> and despite acknowledging that "due to insufficient investigation records having been retained by the Investigating agency, we are unable to form a view either way that the PID Investigator sufficiently considered the shortlisting process itself as part of the investigation of the PID", <sup>164</sup> Mark Anstey concluded his decision with "I cannot conclude that the findings of the PID Investigator were clearly unreasonable."<sup>165</sup>

[252] So Mark Anstey is unable to determine whether Kate McMullan turned her mind to the substance of the allegation, but that the finding that Kate McMullan has not recorded in the investigation report is not "clearly unreasonable." Logic at its finest. Mr Anstey's response isn't to write to the Australian Public Service Commission to recommend, pursuant to section 15 of the *Ombudsman Act 1976* (Cth), the reinvestigation of the patently inadequate investigation that Kate McMullan conducted (Mr Anstey wasn't able to determine "either way" if Kate McMullan had turned her mind to the allegation even after speaking to her as part of his "investigation" for crying out loud). No – Mr Anstey's response to the patent inadequacy of Kate McMullan's public interest disclosure investigation is to terminate the investigation, presumably under section 12 of the *Ombudsman Act 1976* (Cth), because "there is no practical outcome [the Ombudsman] could obtain by further investigating the complaint."

[253] The hell with completing his duties according law. The hell with the explicit purpose of the *Public Interest Disclosure Act 2013* (Cth), which provides that disclosures made by public officials are to be properly investigated and dealt with. <sup>166</sup> The hell with giving effect to the explicit purpose of the *Public Interest Disclosure Act 2013* (Cth), which provides that disclosures made by public officials are to be properly investigated and dealt with. The hell with the integrity of the public interest disclosure system. The hell with integrity, full stop. Nobody cares if allegations of systemic cronyism and patronage in the Federal Court of Australia Statutory Agency go uninvestigated.

[254] I was made to wait 412 days for this kind of ineptitude? Most careless morons in the public service are much more efficient. If Mr Anstey insists on being a careless moron, the least he can be is a productive one.

#### *Ground 4*

[255] Despite the fact that I raised it as an explicit ground of complaint, <sup>167</sup> Mr Anstey did not address my complaint that Ms McMullan had failed to comply with procedures established under subsection 15(3) of the *Public Service Act 1999* (Cth) in investigating alleged breaches of the Code of Conduct,

and had thus failed to comply with paragraph 53(5)(b) of the *Public Interest Disclosure Act 2013* (Cth). Ms McMullan's failure to comply with mandatory procedural requirements was a serious failure, and cannot be dismissed without reason.

[256] Mr Anstey's failure to address my complaint, by ignoring it, is unacceptable and demonstrates just careless and superficial a job Mark Anstey did in conducting his "investigation" under the *Ombudsman Act 1976* (Cth).

#### *Ground 5*

[257] Mark Anstey did not address my explicit complaint about Ms McMullan's failure to investigate the allegation that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct by withholding material information from Chief Justice Allsop and Chief Judge Alstergren when soliciting instruments. <sup>168</sup> Presumably, this was the case because Mr Anstey was, erroneously, of the view that Ms McMullan had found "that disclosable conduct did not occur" and that the view "aligns with the view of the agency with policy responsibility in this area." As I have explained, Mark Anstey's views are unjustifiable.

[258] Kate McMullan's failure to address the allegation demonstrated the inadequacy of public interest disclosure investigation. It was not appropriate for Mr Anstey to terminate his investigation into Ms McMullan's failure to address the allegation without providing adequate reasons as to why he chose to ignore my ground of complaint.

[259] Indeed, Mr Anstey's failure to address my complaint, by ignoring it, is unacceptable and demonstrates just what a careless and superficial job Mark Anstey did in conducting his "investigation" under the *Ombudsman Act 1976* (Cth).

#### Relief sought

[260] I request that:

a) Mr Anstey's decision to terminate the investigation under the *Ombudsman Act 1976* (Cth) be set aside on the basis of the grounds of review;

- b) the investigation under the *Ombudsman Act 1976* (Cth) be completed according to law;
- c) the Ombudsman make a finding that Kate McMullan’s investigation of the public interest disclosure relating to the decision to promote Rohan Muscat was inadequate because her finding that “Rohan Muscat had indicated that he would meet [an essential] qualification within a short period after application ... the lack of (sic) essential requirement at the date of application [does not constitute] disclosable conduct with in the meaning of the PID Act” was fallacious;
- d) the Ombudsman make a finding that Kate McMullan failed to comply with procedures established under subsection 15(3) of the *Public Service Act 1999* (Cth) in investigating alleged breaches of the Code of Conduct and had thus failed to comply with paragraph 53(5)(b) of the *Public Interest Disclosure Act 2013* (Cth);
- e) the Ombudsman make a finding that Ms McMullan failed to properly exercise her duty to investigate the disclosure under the *Public Interest Disclosure Act 2013* (Cth) because she failed to investigate the allegation that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct by withholding material information from Chief Justice Allsop and Chief Judge Alstergren when soliciting instruments of direction;
- f) the Ombudsman prepare a report of his findings, and refer the matter back to the Australian Public Service Commissioner with a recommendation that the Commissioner reinvestigate the public interest disclosure according to law.

### **3. THE DECISION TO “PROMOTE” MURRAY BELCHER**

#### Allegations

[261] In essence, I alleged that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they conspired to deny a candidate, who had been selected for promotion, by a selection committee, to a Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in the Queensland District Registry of the Federal Court, promotion to the Senior Executive Service of the Australian Public Service so that the scarce Senior Executive Band 1 classification could be allocated to somebody else under rule 6 of the *Public Service Classification Rules 2000* (Cth).

[262] I also, in essence, alleged that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct by misleading a Federal Court judge about the selection process pertaining to the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in the Queensland District Registry.

### Salient facts

[263] A Senior Executive Service Band 1 classified National Judicial Registrar & District Registrar vacancy in the Queensland District Registry of the Federal Court was notified in the Public Service Gazette.<sup>169</sup>

[264] According to the selection report for the Senior Executive Service Band 1 classified National Judicial Registrar & District Registrar vacancy in the Queensland District Registry of the Federal Court, 5 candidates were shortlisted for interview.<sup>170</sup>

[265] A selection committee consisting of Sia Lagos, the current Chief Executive Officer and Principal Registrar of the Federal Court, David Pringle, the current Chief Executive Officer and Principal Registrar of Division 1 of the Federal Circuit and Family Court, and Andrea Jarratt, the current Director of National Operations in the Federal Court, selected Murray Belcher as a “recommended candidate” for promotion to the Senior Executive Service Band 1 classified National Judicial Registrar & District Registrar vacancy in the Queensland District Registry.<sup>171</sup> Sia Lagos, David Pringle and Andrea Jarratt certified reading the selection report and agreeing with the contents of the report.<sup>172</sup> They also certified being “aware of the correct policy and procedures for merit selection and certify that these have been followed”.<sup>173</sup>

[266] Sia Lagos, in her capacity as the then Agency Head’s delegate, endorsed the decision of the selection committee to select Murray Belcher for promotion to the Senior Executive Service Band 1 classified National Judicial Registrar & District Registrar vacancy in the Queensland District Registry of the Federal Court.<sup>174</sup>

[267] Kerry Vine-Camp, the then First Assistant Commissioner of the Australian Public Service Commission, was, for the purposes of section 21 of the *Australian Public Service Commissioner’s Directions 2016* (Cth), a full participant in the selection process for the Senior Executive Service Band 1 classified National Judicial Registrar & District Registrar vacancy in the Queensland District Registry of the Federal Court.<sup>175</sup>

[268] On 30 September 2018, Justice Greenwood raised his concerns about Warwick Soden's claims that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Queensland would have to be reclassified in order for the candidate selected by the selection panel to be engaged because the Australian Public Service Commissioner's representative "on the selection panel does not agree with the appointment of [Murray Belcher] to an SES position." <sup>176</sup>

[269] In correspondence sent to Warwick Soden, Sia Lagos, David Pringle and Darrin Moy on 11 October 2018, Justice Greenwood raised anomalies in claims made by Warwick Soden about the role of the representative of the Australian Public Service Commissioner in respect of a selection process for a Senior Executive Service position. Justice Greenwood noted that the representative of the Australian Public Service Commissioner does not have a power of veto over selection processes for Senior Executive Service roles. <sup>177</sup> Justice Greenwood also noted that the representative's role was to certify that the selection process was conducted properly. <sup>178</sup> Justice Greenwood stated that the steps taken to deny Murray Belcher promotion to the Senior Executive Service of the Australian Public Service could not be based on the misplaced view that the representative of the Australian Public Service Commissioner can veto the selection committee's decision to select Mr Belcher as the "recommended candidate" for promotion to the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in the Queensland District Registry of the Federal Court. <sup>179</sup>

[270] On 14 October 2018, Justice Greenwood sent an email to Chief Justice Allsop noting:

a) Warwick Soden's advice that the representative of the Australian Public Service Commissioner has a power of veto over the selection process for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Queensland is inconsistent with the *Public Service Act 1999* and the *Australian Public Service Commissioner's Directions 2016*; and

b) that neither Warwick Soden nor Sia Lagos actually wanted to promote Murray Belcher to the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Queensland because the Senior Executive Band 1 classification had "been taken somewhere else in the organisation." <sup>180</sup>

[271] On 25 October 2018, the representative of the Australian Public Service Commissioner for the purposes of the Senior Executive Band 1 classified National Judicial Registrar & District Registrar selection process, Ms Kerryn Vine-Camp, the then First Assistant Commissioner of the Australian Public Service Commission, certified that she had participated in all stages of the selection process, and that the selection process complied with subsection 10A(2) of the *Public Service Act 1999* (Cth) and the *Australian Public Service Commissioner's Directions 2016* (Cth). <sup>181</sup>

[272] On 31 October 2018, Agency Determination 2018/8 was issued by Warwick Soden. <sup>182</sup> Murray Belcher's classification for the purposes of rule 6 of the *Public Service Classification Rules 2000* (Cth) is recorded as "EL/Legal 2". <sup>183</sup>

Findings and outcomes of Kate McMullan's investigation under the *Public Interest Disclosure Act 2013* (Cth)

[273] The investigator, Kate McMullan, made several findings.

[274] In response to the allegation that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they conspired to deny Murray Belcher promotion to the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in the Queensland District Registry of the Federal Court so that the scarce Senior Executive Band 1 classification could be allocated to somebody else under rule 6 of the *Public Service Classification Rules 2000* (Cth), Ms McMullan made the following finding:

I found no indication amongst the materials provided that Mr Belcher or Mr Trott were particularly targeted for reclassification of their roles. The evidence provided does not support a finding that this had occurred to create SESB1 positions for Ms O'Connor [amongst others] ... [184](#)

[275] Ms McMullan's reasons for this finding are:

The material provided by FCA does indicate that Mr Belcher and Mr Trott applied for SESB1 positions and were ultimately placed into Legal 2 positions. However material provided by FCA also indicates that, following the advertisement of these positions and the finalisation of the recruitment process, a role review was undertaken ... The evidence provided indicates that as a result of a role review, a determination was made that NJR positions could be held at the SESB1 level in some registrars, and at the Legal 2 level in other registrars.

The material provided about this review indicates that these decisions were made on the basis of the relative volume and work undertaken in the various registrars (*sic*). [185](#)

[276] In response to the allegation that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct by misleading a Federal Court judge about the selection process pertaining to the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in the Queensland District Registry, Ms McMullan stated:

On the balance of probabilities, I find that this assertion ... is not sustained. On the basis of the materials provided by FCA, including a selection report, I find that the outcome of the recruitment process was that Mr Belcher was found by the panel ... to be the preferred candidate for the advertised position. On the balance of probabilities, I find that no “veto” power was exercised or purported to be exercised by the [Australian Public Service Commissioner’s] representative. On the balance of probabilities I find that Mr Belcher was appointed to a Legal 2 position on the basis of a role review ...

[I]n the absence of a “veto power” being exercised or being purported to be exercised, any incorrect statement by Mr Soden (whether due to a misstatement on Mr Soden’s behalf, a misunderstanding of Justice Greenwood’s behalf, a miscommunication between the two, or for some other reason) about actions taken by [Australian Public Service Commissioner’s] representative would not in and of itself constitute disclosable conduct. On that basis, I make no further findings about any such comments that may have been made. [186](#)

Errors alleged to have been committed by Kate McMullan in complaint lodged with the Office of the Commonwealth Ombudsman on 26 October 2021

[277] Ms McMullan made many errors. A selection of the errors are set out.

[278] First, there are problems with Ms McMullan’s finding that “following the advertisement of [the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – QLD and the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – WA] positions and the finalisation of the recruitment process, a role review was undertaken.” [187](#) Specifically, in order for Ms McMullan’s finding to be correct, it must be the case that a role review was undertaken, and that the role review was undertaken after a) the advertisement of the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – QLD and the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – WA positions, and b) the finalisation of the recruitment processes for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – QLD and the Senior Executive Band 1 classified National Judicial Registrar & District Registrar WA positions. [188](#)

[279] There was no evidence before Ms McMullan demonstrating that a role review had taken place for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – QLD or the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – WA positions. [189](#)

[280] Second, and related to the first point, Ms McMullan’s claim that “as a result of a role review, a determination was made that NJR positions could be held at the SESB1 level in some registrars, and at the Legal 2 level in other registrars” was unsupportable because a causal relationship existing

between a “role review” and the “determination” that “NJR positions could be held at the SESB1 level in some registrars, and at the Legal 2 level in other registrars” could only be an actuality if there had actually been a role review, which was not the case. [190](#)

[281] Third, I challenged Ms McMullan’s findings that:

a) there was “no indication amongst the materials provided that Mr Belcher or Mr Trott were particularly targeted for reclassification of their roles”; and

b) the “evidence provided does not support a finding that [the “reclassifications”] had occurred to create SESB1 positions for Ms O’Connor [amongst others] ...” [191](#)

[282] I demonstrated how there were many indications amongst the materials provided that Mr Belcher and Mr Trott were particularly targeted for reclassification of their roles, and that the evidence did support a finding that the “reclassifications” had occurred to create SESB1 positions for others, including Ms O’Connor. [192](#)

[283] Fourth, Ms McMullan’s finding that no “veto” power was exercised or purported to be exercised by the [Australian Public Service Commissioner’s] representative was not based on any cogent (i.e. logically probative and relevant) evidence because Ms McMullan had failed to conduct an investigation into the allegation according to the terms of the *Public Interest Disclosure Act 2013* (Cth). [193](#)

[284] Fifth, I took exception to the following statement made by Ms McMullan: [194](#)

[I]n the absence of a “veto power” being exercised or being purported to be exercised, any incorrect statement by Mr Soden (whether due to a misstatement on Mr Soden’s behalf, a misunderstanding of Justice Greenwood’s behalf, a miscommunication between the two, or for some other reason) about actions taken by [Australian Public Service Commissioner’s] representative would not in and of itself constitute disclosable conduct. On that basis, I make no further findings about any such comments that may have been made.

[285] Ms McMullan made fatal errors of reasoning and law because it was not open to Ms McMullan to refuse to make “further findings about any such comments that may have been made.” [195](#) The investigator had, thus, failed to address the allegation that officials in the Federal Court of Australia

Statutory Agency contravened several provisions of the Code of Conduct by misleading a Federal Court judge about the selection process pertaining to the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in the Queensland District Registry. [196](#)

Findings and outcomes of the investigation conducted by Mark Anstey of the Office of the Commonwealth Ombudsman

[286] On 12 December 2022, Mark Anstey, an acting Assistant Director in the Public Interest Disclosure Team of the Ombudsman's Office, terminated an investigation, under the *Ombudsman Act 1976* (Cth), into the errors alleged to have been committed by Ms McMullan. [197](#)

[287] Mr Anstey claimed that the Ombudsman "cannot take any action that would cause an agency to reinvestigate a [public interest disclosure] ... because the [Public Interest Disclosure Act 2013 (Cth)] does not provide a mechanism for a finalised PID investigation to be reopened." [198](#) The falsehood of that legal proposition has been part IV of this email.

[288] Mr Anstey claimed "most of the key findings were not unreasonable for the investigating agency to make." [199](#) That proposition is false, not least for the reasons set out in part XI of this email. Further reasons demonstrating the falsehood of that proposition will be set out below.

[289] Mr Anstey concluded that "there is no practical outcome [the Ombudsman] could obtain by further investigating the complaint", which, as I have demonstrated in part V of this email, is a falsehood, and, on that basis, terminated the investigation into the errors alleged to have been committed by Ms McMullan. [200](#)

[290] In terminating the investigation, Mr Anstey stated: [201](#)

I understand your view that there was not a properly documented review of roles and classifications that would allow an Agency Head to appoint individuals to the relevant position at SES1 or EL2 level.

Conducting and documenting a role review is not set down in legislation. The APS Classification Guide recommends a role review or role evaluation be carried out in certain circumstances, including reviews conducted because of a restructure or reorganisation within an agency. That said, ultimately it is at the discretion of the Agency Head to determine the duties of an employee and determine an appropriate classification based on those duties.

The PID Investigator concluded the material available indicated there had been a role review and the decision to reclassify these positions was made “*on the basis of the relative volume and complexity of work undertaken in the various registrars (sic)*”. I accept that you dispute this. I also appreciate the reasons for the decision could have been better communicated to agency staff, as the PID Investigator noted, and similarly the internal records could have been more detailed. It nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented.

[291] Mr Anstey also stated: [202](#)

In my view, it was reasonably open to the PID Investigator to conclude there was no indication that particular applicants were targeted to have the roles they applied for, and to which they were ultimately appointed, reclassified to be suited to those at EL2 level. I agree with the PID Investigator’s conclusion that the primary lesson to learn from this part of the recruitment process was that the agency should have more clearly communicated with staff about the role review process and what led to the decision to classify certain roles at either EL2 or SES level.

#### Grounds of review in respect of the decision to terminate the Ombudsman’s investigation

[292] My grounds of review are as follows:

- 1) Mr Anstey’s claim that “[t]he APS Classification Guide *recommends* a role review or role evaluation be carried out in certain circumstances ...” is false;
- 2) Mr Anstey’s claim that “[c]onducting and documenting a role review is not set down in legislation” is stunted and misinformed because the legal obligation to conduct and document a role review is legislatively mandated;
- 3) Mr Anstey’s claim that “ultimately it is at the discretion of the Agency Head to determine the duties of an employee and determine an appropriate classification based on those duties” is false;

4) Mr Anstey's claim that "[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented" is unjustifiable;

5) Mr Anstey's claim that "it was reasonably open to the PID Investigator to conclude there was no indication that particular applicants were targeted to have the roles they applied for, and to which they were ultimately appointed, reclassified to be suited to those at EL2 level" is unjustifiable;

6) The fact that Mr Anstey was unperturbed by Ms McMullan's finding that a "decision to reclassify these positions was made *on the basis of the relative volume and complexity of work undertaken in the various registrars (sic)*" demonstrates a failure on Mr Anstey's part to understand how classification decisions are to be made;

7) Mr Anstey's failure to address Ms McMullan's failure to investigate the allegation that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they conspired to deny a candidate, who had been selected for promotion, by a selection committee, to a Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in the Queensland District Registry of the Federal Court, promotion to the Senior Executive Service of the Australian Public Service so that the scarce Senior Executive Band 1 classification could be allocated to somebody else under rule 6 of the *Public Service Classification Rules 2000* (Cth);

8) Mr Anstey's failure to address Ms McMullan's failure to investigate the allegation that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct by misleading a Federal Court judge about the selection process pertaining to the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in the Queensland District Registry.

#### *Ground 1*

[292] I challenge Mr Anstey's claim that "[t]he APS Classification Guide *recommends* a role review or role evaluation be carried out in certain circumstances ..."

[293] First, under the *Public Service Act 1999* (Cth), the Commissioner's functions include:

a) strengthening the professionalism of the Australian Public Service and facilitating continuous improvement in workforce management; [203](#)

b) upholding high standards of integrity and conduct in the Australian Public Service; [204](#)

c) developing, reviewing and evaluating workforce management policies and practices; [205](#) and

d) doing anything incidental to or conducive to the performance of the Commissioner's functions. [206](#)

[294] Second, the *Australian Public Service Classification Guide* sources its existence in the legislated functions of the Australian Public Service Commissioner.

[295] Third, the *Australian Public Service Classification Guide* clearly stipulates the following: [207](#)

Role evaluation is the method of determining the relative work value of a job (role) through assessing the nature, impact and accountabilities of the job. Evidence to support this assessment **should** be gathered in a structured and systematic way.

Role evaluation is a two part process. First, evidence **is** gathered to understand the role (job analysis). Second, the role **is** assessed and measured against established criteria, using work level standards.

[296] Fourth, according to the *Australian Public Service Classification Guide*, the “primary purpose” of role assessment, which is the second limb of role evaluation, is “to allocate a classification level to a job.”[208](#)

[297] Fifth, the *Australian Public Service Classification Guide* stipulates: [209](#)

To classify a job, the information obtained about the role and responsibilities is compared with the relevant work level standards. Work level standards capture the way in which tasks and responsibilities differ across classifications. In determining the appropriate classification for the job, an assessment should consider those characteristics of the work level standards that are most relevant to the role.

[298] Sixth, the *Australian Public Service Classification Guide* provides that:

- a) “[t]horough information and documentation procedures in relation to classification decisions are necessary elements in safeguarding the integrity of the process;” [210](#)
- b) “[a] decision to allocate a new or revised classification level to a job is made under delegated authority under the *Public Service Act 1999* and the *Public Service Classification Rules 2000*”, and that “[t]his means that a record of decision **must** be made, including the reasons for the decision” [211](#)
- c) documenting reasons for the classification decision is **necessary** to safeguard the integrity and transparency of the decision outcome; [212](#)
- d) in the context of documenting classification decisions, “a record **must** be kept of decisions made when exercising authority under the [Public Service] Act or the Classification Rules”. [213](#)

[299] The language employed in the *Australian Public Service Classification Guide* in respect of:

- a) gathering evidence in a structured and systematic way to understand the role;
- b) the assessment against established criteria, including the work level standards, which, the discloser noted is actually a legislatively mandated requirement because rule 9(2A) of the *Public Service Classification Rules 2000* (Cth) explicitly provides that “[t]he allocation of an APS Level classification, Executive Level classification or SES classification **must** be based on the work value of the group of duties **described in the work level standards for that classification**, issued in writing, by the Commissioner”; and

c) maintaining documentary records of the decision by which a classification is allocated to a role, as well as the reasons for that decision,

is **mandatory**.

[300] In essence, these are the indicia of a role evaluation or a role review, which is nothing other than a re-evaluation of a role.

[301] Thus, Mr Anstey's claim that "[t]he APS Classification Guide *recommends* a role review or role evaluation be carried out in certain circumstances ..." is false because, in reality, the Commissioner, who issued the *Australian Public Service Classification Guide* pursuant to relevant provisions contained in section 41 of the *Public Service Act 1999* (Cth), has issued **mandatory instructions** to officials in agencies, including Agency Heads and their delegates, to conduct the following acts in respect of role evaluation:

a) gather evidence in a structured and systematic way to understand the role;

b) assess the evidence against established criteria, including the work level standards, which, the discloser noted is actually a legislatively mandated requirement because rule 9(2A) of the *Public Service Classification Rules 2000* (Cth) explicitly provides that "[t]he allocation of an APS Level classification, Executive Level classification or SES classification **must** be based on the work value of the group of duties **described in the work level standards for that classification**, issued in writing, by the Commissioner"; and

c) maintain documentary records of the decision by which a classification is allocated to a role, as well as the reasons for that decision.

## Ground 2

[302] Mr Anstey's claim that "[c]onducting and documenting a role review is not set down in legislation" is stunted and misinformed.

[303] While the entirety of the **process** for conducting and documenting a role review is not set out in legislation, the **legalobligation** for conducting and documenting a role review in accordance with the *Australian Public Service Classification Guide* is set out in legislation.

[304] Mandatory instructions set out in the *Australian Public Service Classification Guide* are made enforceable by statutory obligations binding Agency Heads, Statutory Office Holders and APS employees.

[305] First, according to subsection 13(11) of the *Public Service Act 1999* (Cth), APS employees are, at all times, required to behave in a way that upholds:

- a) the APS Values and APS Employment principles, and
- b) the integrity and good reputation of the employee's agency and the APS.

[306] Second, the obligations set out in subsection 13(11) of the *Public Service Act 1999* (Cth) are extended to Agency Heads and Statutory Office Holders under section 14 of the *Public Service Act 1999* (Cth).

[307] Third, one of the APS Values pertains to ethics. Subsection 10(2) of the *Public Service Act 1999* (Cth) provides:

The APS demonstrates leadership, is trustworthy, and acts with integrity, in all that it does.

[308] Under s 11 of the *Public Service Act 1999* (Cth), the Australian Public Service Commissioner is empowered to issue directions, in writing, in relation to the APS Values for the purposes of:

- a) ensuring that the APS incorporates and upholds the APS Values; and
- b) determining, where necessary, the scope or application of the APS Values.

[309] Section 14 in the *Australian Public Service Commissioner's Directions 2016* (Cth) (and the revised *Australian Public Service Commissioner's Directions 2022* (Cth)) provides:

Having regard to an individual's duties and responsibilities, upholding the APS Value in subsection 10(2) of the Act requires the following:

...

(e) acting in a way that is right and proper, as well as technically and legally correct or preferable.

[310] Fourth, the mandatory instructions contained in the *Australian Public Service Classification Guide* are the product of a lawful exercise of power on the parts of the Australian Public Service Commissioner, and the staff members who assisted the Commissioner to prepare the Guide, to:

a) strengthen the professionalism of the Australian Public Service and facilitate continuous improvement in workforce management; [214](#)

b) uphold high standards of integrity and conduct in the Australian Public Service; [215](#)

c) develop, review and evaluate workforce management policies and practices; [216](#) and

d) do anything incidental to or conducive to the performance of the Commissioner's functions. [217](#)

[311] Fifth, the mandatory instructions set out in the *Australian Public Service Classification Guide* in respect of role evaluations (and role reviews), and the documentation of such evaluations, are the Australian Public Service Commissioner's lawful instructions on how members of the Australian Public Service and Agency Heads are to exercise powers set out in rule 9 of the *Public Service Classification Rules 2000* (Cth) (i.e. powers relating to the allocation of classifications to groups of duties).

[312] Sixth, no person could reasonably contend that it is ever right and proper, as well as technically and legally correct or preferable to conduct a role evaluation with a view to allocating a classification where:

a) evidence is not gathered in a structured and systematic way to understand the role;

b) the role is not assessed and measured against established criteria, including the work level standards, particularly where rule 9(2A) of the *Public Service Classification Rules 2000* (Cth) requires that “[t]he allocation of an APS Level classification, Executive Level classification or SES classification **must** be based on the work value of the group of duties ***described in the work level standards for that classification***, issued in writing, by the Commissioner”; and

c) documentary records of the decision by which a classification is allocated to a role, as well as the reasons for that decision, are not properly documented.

[313] Since:

a) all Agency Heads, Statutory Office Holders and APS employees are obligated to act in a way that is right and proper, as well as technically and legally correct or preferable; and

b) the instructions set out in the *Australian Public Service Classification Guide* have been issued by the Australian Public Service Commissioner to officials in agencies, including Agency Heads and their delegates, pursuant to relevant provisions contained in section 41 of the *Public Service Act 1999* (Cth); and

c) the instructions set out in the *Australian Public Service Classification Guide* in respect of role evaluations are mandatory; and

d) no person could reasonably contend that it is ever right and proper, as well as technically and legally correct or preferable to conduct a role evaluation with a view to allocating a classification where the mandatory instructions are not complied with,

it follows that Agency Heads, Statutory Office Holders and APS employees have a legal obligation, sourced in the *Public Service Act 1999* (Cth) and elaborated in the *Australian Public Service Commissioner's Directions 2016* (Cth) (and the revised *Australian Public Service Commissioner's Directions 2022* (Cth)), to **always**:

e) gather evidence to support a role evaluation in a structured and systematic way to understand the role;

f) assess and measure the role against established criteria, including the work level standards;

g) properly document the decision by which a classification is allocated to a role, as well as the reasons for that decision, either during a role evaluation or a role reevaluation (i.e. a role review).

[314] Thus, Mr Anstey's claim that "[c]onducting and documenting a role review is not set down in legislation" is stunted and misinformed because while the entirety of the **process** for conducting and documenting a role review is not set out in legislation (entirety because rule 9(2A) of the *Public Service Classification Rules 2000* (Cth) actually imposes an obligation on an Agency Head, or his or her delegate, to base the allocation of a classification to a group of duties on the work value of the group of duties described in the work level standards for the relevant classification), the **legal obligation** for conducting and documenting a role review in accordance with the *Australian Public Service Classification Guide* is set out in legislation.

### *Ground 3*

[315] First, contrary to Mr Anstey's claim that "ultimately it is at the discretion of the Agency Head to determine the duties of an employee and determine an appropriate classification based on those duties", nothing in the language used in the *Australian Public Service Classification Guide* suggests that there is a lawful discretion on the part of any Agency Head, or a person acting with the authority of an Agency Head, to depart from the instructions set out in respect of role evaluations and classification decisions in general. The instructions mandatory.

[316] Second:

a) an Agency Head must allocate an approved classification to each group of duties to be performed in the Agency; <sup>218</sup> and

b) contrary to the claim that “it is at the discretion of the Agency Head to determine the duties of an employee and determine an appropriate classification based on those duties”, the allocation of an approved classification to a group of duties must be based on the work value of the group of duties; <sup>219</sup> and

c) the allocation of an APS Level classification, Executive Level classification or SES classification to a group of duties must be based on the work value of the group of duties described in the work level standards for that classification issued, in writing, by the Australian Public Service Commissioner (as those standards exist on 1 December 2014). <sup>220</sup>

[317] Third, the Agency Head’s power to, from time to time, determine the duties of an APS employee (under section 25 of the *Public Service Act 1999* (Cth)) has nothing to do with the classification that is allocated to groups of duties that the employee has been engaged to undertake (which is determined by section 23 of the *Public Service Act 1999* (Cth), and the *Public Service Classification Rules 2000* (Cth) made pursuant to section 23) because the power under section 25 of the *Public Service Act 1999* (Cth) is only exercisable in respect of an employee, and not in respect of the **groups of duties** that an employee has been engaged to perform. The classification allocated to groups of duties is based on the **work value of the group of duties described in the work level standards for the relevant classification**. If Mr Anstey were correct in claiming that “it is at the discretion of the Agency Head to determine the duties of an employee and determine an appropriate classification based on those duties”, then the Australian Public Service Commission’s *Hierarchy and Classification Review* <sup>221</sup> would have been a pointless exercise because Agency Heads could determine the classification for groups of duties to be performed within a role, independently of objective work level standards and the gathering and assessment of evidence in relation to the proposed groups of duties to be performed as part of a role, by simply determining the duties of the employee at any time.

[318] Therefore, the law provides that the classification allocated to a group of duties is based on nothing other than the work value of the group of duties described in the work level standards, issued by the Australian Public Service Commissioner, and that the law does **not** provide, as Mr Anstey claimed, that the determination of a classification is based on the what an Agency Head determines the duties of an employee are.

#### *Ground 4*

[319] Mr Anstey’s claim that “[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented” is unjustifiable.

[320] I repeatedly noted, in the complaint lodged with the Office of the Commonwealth Ombudsman on 26 October 2021, that there was no evidence before Ms McMullan that a role review of the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in the Queensland District Registry had ever been conducted, and that Ms McMullan's claims that a role review of the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in the Queensland District Registry had been conducted "following the advertisement of [the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in the Queensland District Registry] and the finalisation of the recruitment process" were not based on any cogent or probative evidence. [222](#)

[321] In response to a freedom of information request for access to "[t]he role evaluation records prepared between 1 January 2017 and 31 December 2020, that show that the SES Band 1 classified National Judicial Registrar & District Registrar role in Queensland was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the Public Service Classification Rules 2000", [223](#) an authorised officer in the Federal Court of Australia had refused to grant access because the role evaluation records do not exist. [224](#)

[322] I note that Ms McMullan had completed her public interest disclosure investigation on 9 December 2020 and, thus, could not have relied on documents prepared after that date to conclude that there was a review conducted as the Agency Head of the Federal Court and that the decision was, as Mr Anstey claimed, documented. I also note that Ms McMullan had found that "following the advertisement of these positions and the finalisation of the recruitment process, a role review was undertaken ..." The recruitment process for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in Queensland had been finalised on 25 October 2018, when the Australian Public Service Commissioner's representative certified that she had been a full participant in the selection process, and that the selection process complied with subsection 10A(2) of the *Public Service Act 1999* (Cth) and the *Australian Public Service Commissioner's Directions 2016* (Cth).

[323] How Mr Anstey could have found that it was "reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented" when an official in the Federal Court of Australia has explicitly conceded that no role evaluation records that show that the SES Band 1 classified National Judicial Registrar & District Registrar role in Queensland was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the *Public Service Classification Rules 2000* existed, even though it is mandatory for such records to be prepared and maintained is beyond me. In the absence of records showing that the SES Band 1 classified National Judicial Registrar & District Registrar role in Queensland was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the *Public Service Classification Rules 2000*, I challenge how it is that Mr Anstey could claim to have access to the Agency Head's documented decision demonstrating that

“the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level ...” I will submit a freedom of information request for access to the document that Mark Anstey claims evidences that fact that “the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level ...”

[324] Given that “[t]he role evaluation records prepared between 1 January 2017 and 31 December 2020, that show that the SES Band 1 classified National Judicial Registrar & District Registrar role in Queensland was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the Public Service Classification Rules 2000” do not exist, Mr Anstey’s claim that “[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented” contradicts the public and humiliating concession of the Federal Court of Australia and, being contradictory, is plainly unjustifiable.

#### *Ground 5*

[325] I contest Mr Anstey’s claim that “it was reasonably open to the PID Investigator to conclude there was no indication that particular applicants were targeted to have the roles they applied for, and to which they were ultimately appointed, reclassified to be suited to those at EL2 level” because I provided at least five items of documentary evidence to the Office of the Commonwealth Ombudsman, when my complaint was lodged on 26 October 2021, indicating that the Senior Executive Band 1 classification that should have been allocated to Mr Belcher, under rule 6 of the *Public Service Classification Rules 2000* (Cth), was allocated to a person who did not apply for the position she was ultimately engaged to fill, as alleged.

[326] The first document is a document titled *Judicial Registrar Recruitment*. [225](#)

[327] The second document is an email from Warwick Soden to Sia Lagos, Catherine Sullivan and Darrin Moy dated 25 September 2018. [226](#)

[328] The third document is an email sent by Justice Greenwood dated 14 October 2018. [227](#)

[329] The fourth document is an email sent by Warwick Soden to Darrin Moy on 15 October 2018. [228](#)

[330] The fifth document is document titled *Judicial Registrar Recruitment – Budget*, [229](#) which was attached to an email sent from Sia Lagos to Catherine Sullivan, Darrin Moy and Andrea Jarratt on 5 October 2018. [230](#)

A. *Judicial Registrar Recruitment* document

[331] I draw your attention to the eight page *Judicial Registrar Recruitment* document.

[332] The document commences as follows:

Further to my memorandum of 22 August 2018 regarding the registrar recruitment exercise, this paper provides a further update on the recruitment exercise and recommendations endorsed by the recruitment panel for the appointment of candidates to the Senior National Judicial Registrar (SES2), National Judicial Registrar & District Registrar - VIC, QLD and WA (SES1), Judicial Registrar & District Registrar - TAS (Legal 2) and National Judicial Registrar – Native Title (SES1) positions, subject to your consideration and approval.

[333] I draw attention to the fact that the National Judicial Registrar & District Registrar role in the Queensland District Registry of the Federal Court bears a Senior Executive Band 1 classification according to the author of the document.

[334] Among other things, the author of the document sets out, in a table on page 4, Federal Court registrar roles for which recruitment processes had been undertaken, and identifies the candidates selected by the selection committees for the relevant registrar roles in the Federal Court.

[335] One of the roles identified in the table is the “National Judicial Registrar & District Registrar – QLD Registry (SES1).” I draw your attention to the fact that the National Judicial Registrar & District Registrar role in the Queensland District Registry of the Federal Court bears a Senior Executive Band 1 classification.

[336] The names of three lead candidates are set out in the column next to the position, and comments are set out in relation to the lead candidates in a column next to their names. The name of

the candidate selected by the selection committee consisting of Sia Lagos, David Pringle and Andrea Jarratt to fill the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role is the Queensland District Registry of the Federal Court is Murray Belcher. <sup>231</sup>Kerryn Vine-Camp, the Australian Public Service Commissioner's representative for the purposes of the selection process for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy, certified that she had been a full participant in the selection process, and that the selection process complied with subsection 10A(2) of the *Public Service Act 1999* (Cth) and the *Australian Public Service Commissioner's Directions 2016* (Cth). <sup>232</sup>

[337] In the column next to Mr Belcher's name is the following typed comment:

Appoint to position subject to Murray's existing Judicial Registrar (Legal 2) position not backfilled.

Refer to Greenwood J memorandum

[338] Next to the typed comment is a handwritten note – "No SES".

[339] On the eighth page of the document is a handwritten note, which reads:

Sia

Changes to be managed within 17/18 NOR appropriation. Proposed recruitment approved subject to me seeing & approving reconciliation of costs against budget by Finance Dept (Kat Hunter & Catherine Sullivan).

SES positions WA & QLD not to be filled – positions to be transferred to Sydney – WA & QLD DRs to be filled at Legal 2 with allowance (IFAs) if possible.

[340] The document was signed by Warwick Soden and dated "25/9/18".

[341] Contrary to Mr Anstey's claim, it was not reasonably open to the PID Investigator to conclude there was no indication that particular applicants were targeted to have the roles they applied for, and to which they were ultimately appointed, reclassified to be suited to those at EL2 level.

[342] First, it is plain that National Judicial Registrar & District Registrar role in the Queensland District Registry of the Federal Court bears a Senior Executive Band 1 classification.

[343] It was also plain that there had been no re-evaluation of the role such that the role could bear an Executive Level 2 or “Legal 2” classification. That is clear not only because a decision maker in the Federal Court has confirmed that “role evaluation records prepared between 1 January 2017 and 31 December 2020, that show that the SES Band 1 classified National Judicial Registrar & District Registrar role in Queensland was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the *Public Service Classification Rules 2000*” do not exist.<sup>233</sup> It is clear because Mr Soden refers explicitly to the “SES positions in WA & QLD” in his notes. Had the National Judicial Registrar & District Registrar positions in Western Australia and Queensland been lawfully reclassified to bear Executive Level 2 classifications, then Mr Soden would not have referred to the positions as SES positions.

[344] Second, Mr Soden explicitly states that the “WA & QLD DRs to be filled at Legal 2 with allowance (IFAs) if possible.” “DRs” is an abbreviation for District Registrars, and “IFA” is an abbreviation for *independent flexibility arrangement*, which is an arrangement “enabling an employee and his or her employer to agree on an arrangement varying the effect of the agreement in relation the employee and the employer, in order to meet the genuine needs of the employee and employer.”<sup>234</sup>

[345] An IFA applies between an employer and an employee; it has nothing to do with the allocation of an approved classification, under rule 9 of the *Public Service Classification Rules 2000* (Cth), to each group of duties to be performed in the Federal Court based on the work value of the group of duties described in the work level standards for a particular classification. In other words, consideration of an IFA or its use is of no relevance to the allocation of an approved classification, under rule 9 of the *Public Service Classification Rules 2000* (Cth), to each group of duties to be performed in any agency.

[346] Given that an IFA applies between an employer and an employee, and the IFA was to be offered to supplement the Legal 2 classification allocated to the “WA & QLD DRs”, the natural conclusion to draw would be that Mr Soden had decided to allocate an Executive Level 2 (i.e. Legal 2) classification to Murray Belcher, upon his “promotion” to the National Judicial Registrar & District Registrar role in Queensland, pursuant to **rule 6** of the *Public Service Classification Rules 2000* (Cth), which requires an Agency Head to “allocate an approved classification to each APS employee in the Agency.”

[347] Mr Soden’s decision was problematic because the classification allocated to Mr Belcher under rule 6 of the *Public Service Classification Rules 2000* (Cth) did not match the classification that had been allocated to the groups of duties associated with the National Judicial Registrar & District Registrar role in Queensland under rule 9 of the *Public Service Classification Rules 2000* (Cth). The National Judicial Registrar & District Registrar role in Queensland bore, and continues to formally bear, a Senior Executive Band 1 classification and the National Judicial Registrar & District Registrar role in Queensland has never been the subject of a role re-evaluation (i.e. role review), by which the National Judicial Registrar & District Registrar role was reclassified to bear an Executive Level 2 (i.e. Legal 2) classification.

[348] Third, Mr Soden explicitly states that the SES “positions [are] to be transferred to Sydney.” This could not possibly mean that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar roles in the Queensland and Western Australia District Registries would be transferred to Sydney because a District Registrar is, by law, required to be located in the District Registry of the relevant State.<sup>235</sup> Rather, and as is the case, the National Judicial Registrar & District Registrar of Queensland is based in the Queensland District Registry, and the classification that would have been allocated to him under **rule 6** of the *Public Service Classification Rules 2000* (Cth) was allocated to a person based in Sydney.

[349] Since:

a) there was no evidence before Ms McMullan that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Queensland had been the subject of a role re-evaluation (i.e. a role review) such that the groups of duties to be performed by the National Judicial Registrar & District Registrar in Queensland should have, on the evidence and in the light of the Commissioner’s work level standards, been allocated an Executive Level 2 classification; and

b) a decision maker in the Federal Court has explicitly acknowledged that role evaluation records showing that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Queensland was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, ever reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the *Public Service Classification Rules 2000* do not exist;<sup>236</sup> and

c) Warwick Soden decided to allocate an Executive Level 2 classification to Murray Belcher on 25 September 2018 and, on 31 October 2018 did, in fact, allocate an Executive Level 2 classification to Murray Belcher under *Agency Determination 2018/8*,<sup>237</sup> even though the National Judicial Registrar & District Registrar role in Queensland bore, and continued to bear, a Senior Executive Band 1 classification; and

d) Warwick Soden explicitly stated that the SES “positions [are] to be transferred to Sydney”, <sup>238</sup> where, as would become apparent, there were proposals to allocate two Senior Executive Band 1 classifications to individuals who did not apply for the roles they were offered because those roles were not notified to the public according to law,

it was not, as Mr Anstey claimed, “reasonably open to the PID Investigator to conclude there was **no indication** that particular applicants were targeted to have the roles they applied for, and to which they were ultimately appointed, reclassified to be suited to those at EL2 level.”

B. Email from Warwick Soden to Sia Lagos, Catherine Sullivan and Darrin Moy dated 25 September 2018

[350] I draw your attention to the substance of an email that Warwick Soden sent to Sia Lagos, Catherine Sullivan and Darrin Moy on 25 September 2018, <sup>239</sup> the same day that he set out his notations on the *Judicial Registrar Recruitment* document.

[351] The emails reads as follows: <sup>240</sup>

My reference in my hand written comments on the document discussed with Sia a copy of which I gave to Darrin referred to 17/18 budget. It should have been the approved 18/19 budget. No confusion or “mischief” intended.

[352] I question how Mr Anstey could have concluded that it was “reasonably open to the PID Investigator to conclude there was **no indication** that particular applicants were targeted to have the roles they applied for, and to which they were ultimately appointed, reclassified to be suited to those at EL2 level” when Mr Soden had, impishly, claimed that there was no mischief intended in allocating an Executive Level 2 classification to Murray Belcher, even though the role he had been selected for promotion to was classified, and remained classified, at the Senior Executive Band 1 classification level, and where it was clear that the Senior Executive Band 1 classification that should have been allocated to Mr Belcher under rule 6 of the *Public Service Classification Rules 2000* (Cth) had been “transferred to Sydney”.

C. Email from Justice Greenwood dated 14 October 2018

[353] I draw your attention to the substance of an email that Justice Greenwood sent on 14 October 2018, in which the Judge noted: [241](#)

Two things should be noted. First, Warwick's advice that the APSC has a veto on an appointment is wrong. It is inconsistent with the [Public Service] Act 1999 and the APS Guidelines 2016. Second, the true position is that neither Warwick nor Sia wanted to appoint MB [Murray Belcher]. The so-called "veto" is a red herring (obfuscation would be a better word) to prevent Murray being awarded the position. The SES classification, you will find, will have been taken somewhere else in the organisation.

[354] Since a Federal Court Judge had observed that the SES classification that should have been allocated to Murray Belcher had been "taken somewhere else in the organisation" it was not "reasonably open to the PID Investigator to conclude there was ***no indication*** that particular applicants were targeted to have the roles they applied for, and to which they were ultimately appointed, reclassified to be suited to those at EL2 level." On the contrary, it was patently unreasonable to dismiss Justice Greenwood's observation. Mr Anstey might as well have said that Justice Greenwood's observation was worthless because, in his view, it was open to Ms McMullan to conclude that Justice Greenwood's observation amounted to "***no indication*** that particular applicants were targeted to have the roles they applied for, and to which they were ultimately appointed, reclassified to be suited to those at EL2 level."

D. Email from Warwick Soden to Darrin Moy dated 15 October 2018

[355] I draw your attention to an email that Warwick Soden had forwarded to Darrin Moy, which contained Justice Greenwood's email of 14 October 2018 in the email chain. The email reads as follows: [242](#)

Darrin

Any suggestions? This is keeping me awake!!!!!!!

Have the 2 people to be appointed in Sydney been given offers for the ses positions? Have they accepted? Would the APSC agree to give us 2 new SES positions? Hold firm? Does Sia have suggestions?

Warwick

[356] Given that I had alleged that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they conspired to deny a candidate, who had been selected for promotion, by a selection committee, to a Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in the Queensland District Registry of the Federal Court, promotion to the Senior Executive Service of the Australian Public Service so that the scarce Senior Executive Band 1 classification could be allocated to somebody else under rule 6 of the *Public Service Classification Rules 2000* (Cth), I question how Mr Anstey could have concluded that it was “reasonably open to the PID Investigator to conclude there was **no indication** that particular applicants were targeted to have the roles they applied for, and to which they were ultimately appointed, reclassified to be suited to those at EL2 level”, particularly when:

a) it was apparent that Warwick Soden explicitly acknowledged that two people in Sydney were to be appointed to SES positions, <sup>243</sup> even though there was no evidence that the two SES positions in Sydney had been notified to the public; and

b) Warwick Soden had explicitly noted that “SES positions WA & QLD not to be filled – positions to be transferred to Sydney – WA & QLD DRs to be filled at Legal 2 with allowance (IFAs) if possible”;<sup>244</sup> and

c) Mr Soden had allocated an Executive Level 2 classification to Mr Belcher, under rule 6 of the *Public Service Classification Rules 2000* (Cth), <sup>245</sup> which did not match the Senior Executive Band 1 classification that had been allocated to the groups of duties associated with the National Judicial Registrar & District Registrar role in Queensland under rule 9 of the *Public Service Classification Rules 2000* (Cth);<sup>246</sup> and

d) a decision maker in the Federal Court of Australia has, in response to a freedom of information request for access to “[t]he role evaluation records prepared between 1 January 2017 and 31 December 2020, that show that the SES Band 1 classified National Judicial Registrar & District Registrar role in Queensland was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the *Public Service Classification Rules 2000*”, <sup>247</sup> confirmed that the role evaluation records do not exist. <sup>248</sup>

#### *E. Judicial Registrar Recruitment – Budget document*

[357] I draw your attention to page eight of the *Judicial Registrar Recruitment* document and, specifically, Mr Soden’s handwritten comments, which read: <sup>249</sup>

Sia

Changes to be managed within 17/18 NOR appropriation. Proposed recruitment approved subject to me seeing & approving reconciliation of costs against budget by Finance Dept (Kat Hunter & Catherine Sullivan) ...

[358] On 5 October 2018, Sia Lagos sent an email to Catherine Sullivan, The Executive Director of Corporate Services in the Federal Court. [250](#) The email was copied to Darrin Moy, the Federal Court's Executive Director of People, Culture and Communications, and Andrea Jarratt, the Director of National Operations. [251](#) The email reads: [252](#)

... I have just had a meeting with Darrin regarding the proposal and proposed remuneration offers and he supports the proposal. I understand that Warwick has requested from you a reconciliation of the resourcing costs in terms of the NOR Budget for 2018/2019.

Can you please review the proposal and advise that the resourcing can be accommodated within the NOR Budget for 2018/2019.

[359] Attached to the email was the *Judicial Registrar Recruitment – Budget* document. [253](#)

[360] The *Judicial Registrar Recruitment – Budget* document sets out the details of individuals who were “successful candidates” in the registrar recruitment exercise undertaken by the Court. [254](#)

[361] As expected, Murray Belcher and Russell Trott are, respectively, listed as the successful candidates for the National Judicial Registrar and District Registrar positions in the Queensland and Western Australia District Registries of the Federal Court. [255](#) Not so expectedly, both Mr Belcher and Mr Trott are listed as having been allocated “Legal 2” classifications. [256](#)

[362] Curiously, two names have been included on the list of successful candidates. The first name is Susan O'Connor and the second is Drew Pearson. [257](#)

[363] I again draw your attention to the *Judicial Registrar Recruitment* document. [258](#)

[364] Among other things, the author of the document sets out, in a table on page 4, Federal Court registrar roles for which recruitment processes had been undertaken, and identifies the candidates selected by the selection committees for the relevant registrar roles in the Federal Court.

[365] One of the roles identified in the table is the “Senior National Judicial Registrar (SES2).” [259](#) The discloser drew Mr Anstey’s attention to the fact that the Senior National Judicial Registrar role bears a Senior Executive Band 2 classification. [260](#)

[366] The names of three lead candidates are set out in the column next to the position, and comments are set out in relation to the lead candidates in a column next to their names. The name of the candidate selected by the selection committee consisting of Sia Lagos, David Pringle and Andrea Jarratt to fill the Senior Executive Band 2 classified Senior National Judicial Registrar role is Paul Farrell. [261](#) The names of candidates who were unsuccessful are also listed. [262](#) Among the unsuccessful candidates were Susan O’Connor, “Principal of Griffith Hack Lawyers since 2014”, and Drew Pearson, “Partner at Herbert Smith Freehills since 2013”. [263](#) Both are listed as being based in Sydney. [264](#)

[367] In the column next to Ms O’Connor’s name is the following typed comment: [265](#)

Appoint to a new Judicial Registrar – Legal 2 position (Syd). Would require allowance equivalent to SES1 or higher. Additional cost unless resource allocation scenario is applied (see section below).

[368] Next to the typed comments is a handwritten note, which reads “IFA OK (Funds).”

[369] In the column next to Ms Pearson’s name is the following typed comment:

Appoint to a new Judicial Registrar – Legal 2 position (Syd). Would require allowance equivalent to SES1 or higher. Additional cost unless resource allocation scenario is applied (see section below).

[370] Next to the typed comments is a handwritten note, which reads “IFA OK (Funds).” [266](#)

[371] It is readily apparent that, despite failing to secure the Senior Executive Band 2 classified Senior National Judicial Registrar role they applied for, Ms O'Connor and Mr Pearson were to be offered "Legal 2" positions in Sydney, each with an "allowance equivalent to SES1 or higher." <sup>267</sup> It is also clear that the mechanism to be used to secure this higher allowances would be an individual flexibility arrangement, which, according to clause 4.1 of the *Federal Court of Australia Enterprise Agreement 2018-2021* [2018] FWCA 4493, does not apply to Senior Executive Service employees.

[372] Yet, almost magically, according to *Judicial Registrar Recruitment – Budget* document, Susan O'Connor and Drew Pearson were the "successful candidates" for Senior Executive Band 1 classified National Judicial Registrar vacancies in Sydney. <sup>268</sup>

[373] It is, at this point, worth noting that, in response to a freedom of information request for access to the "SES Band 1 classified National Judicial Registrar vacancy notification, published in the Public Service Gazette, that Susan O'Connor was selected to fill in the course of a merit based selection process ...", <sup>269</sup> an authorised decision maker in the Federal Court refused access to the document because the document does not exist. <sup>270</sup>

[374] According to the *Judicial Registrar Recruitment – Budget* document, Susan O'Connor appears to have accepted the Senior Executive Band 1 classified National Judicial Registrar role in Sydney, <sup>271</sup> while Drew Pearson appears to have declined the offer for the Senior Executive Band 1 classified National Judicial Registrar role in Sydney. <sup>272</sup>

[375] Nonetheless:

a) despite the fact that in response to a freedom of information request for access to "[t]he role evaluation records prepared between 1 January 2017 and 31 December 2020, that show that the SES Band 1 classified National Judicial Registrar & District Registrar role in Queensland was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the Public Service Classification Rules 2000", <sup>273</sup> an authorised officer in the Federal Court of Australia confirmed that the role evaluation records do not exist; <sup>274</sup> and

b) despite the fact that Warwick Soden noted "SES positions WA & QLD not to be filled – positions to be transferred to Sydney – WA & QLD DRs to be filled at Legal 2 with allowance (IFAs) if possible"; <sup>275</sup>

c) despite the fact that, had the Senior Executive Band 1 classified National Judicial Registrar and District Registrar roles in the Queensland and Western Australia District Registries actually been subjected to role reviews and been reclassified to bear Executive Level 2 classification, Mr Soden would not have had any cause to refer to the transfer of “SES positions in WA & QLD” to Sydney; [276](#) and

d) despite the fact that an independent flexibility arrangement cannot be allocated to a group of duties under rule 9 of the *Public Service Classification Rules 2000* (Cth), and can only be entered into with a natural person and, in this instance, was to be used to supplement the classification allocated to Mr Belcher under rule 6 of the *Public Service Classification Rules 2000* (Cth); and

e) despite the fact that there was no evidence before Ms McMullan that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Queensland had been the subject of a role re-evaluation (i.e. a role review) such that the groups of duties to be performed by the National Judicial Registrar & District Registrar in Queensland should, on the evidence and in the light of the Commissioner’s work level standards, be allocated an Executive Level 2 classification; and

f) despite the fact that Mr Soden had, impishly, claimed that there was no mischief intended in allocating an Executive Level 2 classification to Murray Belcher, [277](#) even though the role he had been selected for promotion to was classified, and remained classified, at the Senior Executive Band 1 classification level; and

g) despite the fact that Justice Greenwood had, in an email dated 14 October 2018, explicitly observed, in relation to the classification to be allocated to Murray Belcher under rule 6 of the *Public Service Classification Rules 2000* (Cth), that the “SES classification, you will find, will have been taken somewhere else in the organisation”; [278](#) and

h) despite the fact that Justice Greenwood had, in an email dated 14 October 2018, explicitly noted that “Warwick’s advice that the APSC has a veto on an appointment is wrong” and that the advice “is inconsistent with the [Public Service] Act 1999 and the APS Guidelines 2016”; [279](#) and

i) despite the fact that Justice Greenwood had, in an email dated 14 October 2018, explicitly noted that the “advice” provided to Justice Greenwood about the Australian Public Service Commissioner’s representative powers of “veto” over the selection process were proffered to obfuscate “the true position”, which was “that neither Warwick nor Sia wanted to appoint [Murray Belcher]”; [280](#)

j) despite the fact that Murray Belcher was selected by a selection committee consisting of Sia Lagos, David Pringle and Andrea Jarratt, for promotion to the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Queensland, [281](#) and despite the fact that Sia Lagos endorsed, as the Agency Head's delegate, the selection committee's decision to promote Murray Belcher to the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Queensland, [282](#) and despite the fact that, on 25 October 2018, Kerry Vine-Camp certified that she had been a full participant in the selection process for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Queensland and that the process complied with subsection 10A(2) of the *Public Service Act 1999* (Cth) and the *Australian Public Service Commissioner's Directions 2016* (Cth), [283](#) in the *Judicial Registrar Recruitment – Budget* document, which was sent by Sia Lagos to Catherine Sullivan, among others, on 5 October 2018, Murray Belcher is listed as the “successful candidate” for a “Legal 2” classified National Judicial Registrar & District Registrar role in Queensland, [284](#) even though the Federal Court has explicitly acknowledged that no record of role evaluation documents, which were prepared between 1 January 2017 and 31 December 2020, showing that the SES Band 1 classified National Judicial Registrar & District Registrar role in Queensland was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the *Public Service Classification Rules 2000* exists; [285](#) and

k) despite the fact that Susan O'Connor and Drew Pearson had both failed to secure the Senior Executive Band 2 classified Senior National Judicial Registrar role, [286](#) and despite the fact that Susan O'Connor and Drew Pearson were to, as consolation, be offered “Legal 2” Judicial Registrar roles in Sydney, [287](#) both Susan O'Connor and Drew Pearson were, in the *Judicial Registrar Recruitment – Budget* document prepared by Sia Lagos, listed as being the “successful candidates” for Senior Executive Band 1 classified National Judicial Registrar roles based in Sydney; [288](#) and

l) despite the fact that an official in the Federal Court has acknowledged that the “SES Band 1 classified National Judicial Registrar vacancy notification, published in the Public Service Gazette, that Susan O'Connor was selected to fill in the course of a merit based selection process ...” does not exist; [289](#) and

m) despite the fact that Mr Soden, in an email sent on 15 October 2018, confessed to “transfer” of the “SES positions WA & QLD” to Sydney keeping him awake at night, [290](#)

Mr Anstey's view is that “it was reasonably open to the PID Investigator to conclude there was **no indication** that particular applicants were targeted to have the roles they applied for, and to which they were ultimately appointed, reclassified to be suited to those at EL2 level.” **No indication** that applicants were targeted to have the roles they applied for, and to which they were ultimately appointed, reclassified to be suited to those at EL2 level? **Only if you are a mandarin with the acuity of a kumquat.**

[376] Plainly, Mr Anstey’s view that “it was reasonably open to the PID Investigator to conclude there was **no indication** that particular applicants were targeted to have the roles they applied for, and to which they were ultimately appointed, reclassified to be suited to those at EL2 level” is unjustifiable because, for the reasons set out above, there is ample evidence indicating “that particular applicants were targeted to have the roles they applied for, and to which they were ultimately appointed, reclassified to be suited to those at EL2 level.”

[377] More to the point, there is ample evidence indicating that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they conspired to deny a candidate, who had been selected for promotion, by a selection committee, to a Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in the Queensland District Registry of the Federal Court, promotion to the Senior Executive Service of the Australian Public Service so that the scarce Senior Executive Band 1 classification could be allocated to somebody else under rule 6 of the *Public Service Classification Rules 2000* (Cth).

## Ground 6

[378] The fact that Mr Anstey was unperturbed by Ms McMullan’s finding that a “decision to reclassify these positions was made **on the basis of the relative volume and complexity of work undertaken in the various registrars (sic)**” demonstrates a failure on Mr Anstey’s part to understand how classification decisions are to be made, and demonstrates the inadequacy of Mark Anstey’s investigation.

[379] First, the Australian Public Service Classification Guide sets out in clear and unambiguous terms that the work volume of a role does not influence its work value. [291](#)

[380] Second:

The appropriate classification of a job should be determined based on the complexity and responsibility of tasks involved, not the number of tasks or how busy the role is. Work volume may influence the number of employees needed to perform the duties.” [292](#)

[381] Third, the role evaluation principles explicitly provide “[d]o not classify a job on the basis of the workload or how busy it is.” [293](#)

[382] Fourth, according to subsection 13(11) of the *Public Service Act 1999* (Cth), APS employees are, at all times, required to behave in a way that upholds:

- a) the APS Values and APS Employment principles, and
- b) the integrity and good reputation of the employee's agency and the APS.

[383] Fifth, the obligations set out in subsection 13(11) of the *Public Service Act 1999* (Cth) are extended to Agency Heads and Statutory Office Holders under section 14 of the *Public Service Act 1999* (Cth).

[384] Sixth, one of the APS Values pertains to ethics. Subsection 10(2) of the *Public Service Act 1999* (Cth) provides:

The APS demonstrates leadership, is trustworthy, and acts with integrity, in all that it does.

[385] Under s 11 of the *Public Service Act 1999* (Cth), the Australian Public Service Commissioner is empowered to issue directions, in writing, in relation to the APS Values for the purposes of:

- a) ensuring that the APS incorporates and upholds the APS Values; and
- b) determining, where necessary, the scope or application of the APS Values.

[386] Section 14 in the *Australian Public Service Commissioner's Directions 2016* (Cth) (and the revised *Australian Public Service Commissioner's Directions 2022* (Cth)) provides:

Having regard to an individual's duties and responsibilities, upholding the APS Value in subsection 10(2) of the Act requires the following:

...

(e) acting in a way that is right and proper, as well as technically and legally correct or preferable.

[387] Seventh, the guidance contained in the *Australian Public Service Classification Guide* on the fact that the classification of role “should be determined based on the complexity and responsibility of tasks involved, [and] not the number of tasks or how busy the role is” <sup>294</sup> is the product of a lawful exercise of power on the parts of the Australian Public Service Commissioner, and the staff members who assisted the Commissioner to prepare the Guide, to:

a) strengthen the professionalism of the Australian Public Service and facilitate continuous improvement in workforce management; <sup>295</sup>

b) uphold high standards of integrity and conduct in the Australian Public Service; <sup>296</sup> and

c) develop, review and evaluate workforce management policies and practices. <sup>297</sup>

[388] Eighth, no person could reasonably contend that it is ever right and proper, as well as technically and legally correct or preferable, to classify (or reclassify) a role based on “how busy the role is” or, as Kate McMullan put it, “**on the basis of the relative volume ... of work undertaken in the various registrars (sic)**”, because, as the Australian Public Service Classification Guide provides, while “[w]ork volume may influence the number of employees needed to perform the duties”, <sup>298</sup> it has no bearing on the “appropriate classification of a job”, which “should be determined based on the complexity and responsibility of tasks involved, not the number of tasks or how busy the role is.” <sup>299</sup>

[389] Since:

a) all Agency Heads, Statutory Office Holders and APS employees are obligated to act in a way that is right and proper, as well as technically and legally correct or preferable; and

b) the instructions set out in the *Australian Public Service Classification Guide* have been issued by the Australian Public Service Commissioner to officials in agencies, including Agency Heads and their delegates, pursuant to relevant provisions contained in section 41 of the *Public Service Act 1999* (Cth); and

c) the instructions set out in the *Australian Public Service Classification Guide* in respect of the classification or reclassification of a role provide that the classification “should be determined based on the complexity and responsibility of tasks involved, [and] not the number of tasks or how busy the role is”; and

d) the instructions set out in the *Australian Public Service Classification Guide* in respect of the classification or reclassification of a role provide that it is impermissible to “classify a job on the basis of the workload or how busy it is”; and

e) no person could reasonably contend that it is ever right and proper, as well as technically and legally correct or preferable to conduct a role evaluation (including the so-called “role review” of the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in the Queensland District Registry of the Federal Court) “*on the basis of the relative volume ... of work undertaken in the various registrars (sic)*”,

it follows that Agency Heads, Statutory Office Holders and APS employees have a legal obligation, sourced in the *Public Service Act 1999* (Cth) and elaborated in the *Australian Public Service Commissioner’s Directions 2016* (Cth) (and the revised *Australian Public Service Commissioner’s Directions 2022* (Cth)), to ***always*** take heed of the instruction in the *Australian Public Service Classification Guide* that provides that while “[w]ork volume may influence the number of employees needed to perform the duties”,<sup>300</sup> it has no bearing on the “appropriate classification of a job”, which “should be determined based on the complexity and responsibility of tasks involved, not the number of tasks or how busy the role is.”<sup>301</sup>

[390] The fact that Kate McMullan satisfied herself that the so-called “role review” of the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in the Queensland District Registry of the Federal Court was conducted “***on the basis of the relative volume ... of work undertaken in the various registrars (sic)***”, contrary to the Australian Public Service Commissioner’s very instructions demonstrates the patent inadequacy of Kate McMullan’s public interest disclosure investigation.

[391] It also demonstrates the inadequacy of Mark Anstey’s decision because he is perfectly content to allow Kate McMullan to base her finding on a proposition that contradicts the instructions of the Australian Public Service Commissioner, which provide that while “[w]ork volume may influence the number of employees needed to perform the duties”,<sup>302</sup> it has no bearing on the “appropriate classification of a job”, which “should be determined based on the complexity and responsibility of tasks involved, not the number of tasks or how busy the role is.”<sup>303</sup>

[392] As Mr Anstey himself admitted in his decision letter “our investigation of a complaint of this kind focuses on the actions the agency took to investigate and finalise a PID, and whether those actions met the requirements of the PID Act and the Public Interest Disclosure Standard 2013 (PID Standard).” In the light of that concession, how is it that Mr Anstey could be untroubled by the merits of Kate McMullan’s finding that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in the Queensland District Registry was reclassified “***on the basis of the relative volume ... of work undertaken in the various registrars (sic)***”, when it was never open to Kate McMullan, an acting assistant commissioner in the Australian Public Service Commission, to contradict the instructions of the Australian Public Service Commissioner, which provide that while “[w]ork volume may influence the number of employees needed to perform the duties”,<sup>304</sup> it has no bearing on the “appropriate classification of a job”, which “should be determined based on the complexity and responsibility of tasks involved, not the number of tasks or how busy the role is”, while conducting her public interest disclosure investigation?

[393] The fact that Mr Anstey was unperturbed by Ms McMullan’s finding that a “decision to reclassify these positions was made *on the basis of the relative volume and complexity of work undertaken in the various registrars (sic)*” demonstrates a failure on Mr Anstey’s part to understand how classification decisions are to be made, and demonstrates the inadequacy of Mark Anstey’s investigation, and demonstrates how Mark Anstey is prepared to exculpate Kate McMullan for conducting a patently inadequate investigation.

## *Ground 7*

[394] Mr Anstey did not address Ms McMullan’s failure to investigate the allegation that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they conspired to deny a candidate, who had been selected for promotion, by a selection committee, to a Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in the Queensland District Registry of the Federal Court, promotion to the Senior Executive Service of the Australian Public Service so that the scarce Senior Executive Band 1 classification could be allocated to somebody else under rule 6 of the *Public Service Classification Rules 2000* (Cth). Presumably, this was the case because Mr Anstey was, erroneously, of the view that Ms McMullan was justified in concluding “there was no indication that particular applicants were targeted to have the roles they applied for, and to which they were ultimately appointed, reclassified to be suited to those at EL2 level.”

[395] Ms McMullan’s failure to address the allegation demonstrated the inadequacy of public interest disclosure investigation. It was not appropriate for Mr Anstey to terminate his investigation into Ms McMullan’s failure to address the allegation without providing adequate reasons, especially because I have demonstrated that there is ample evidence indicating that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they conspired to deny a candidate, who had been selected for promotion, by a selection committee, to a Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in the Queensland District Registry of the Federal Court, promotion to the Senior Executive Service of the

Australian Public Service so that the scarce Senior Executive Band 1 classification could be allocated to somebody else under rule 6 of the *Public Service Classification Rules 2000* (Cth).

#### *Ground 8*

[396] Mr Anstey did not address Ms McMullan's failure to investigate the allegation that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct by misleading a Federal Court judge about the selection process pertaining to the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in the Queensland District Registry.

[397] According to part 2.7.7.1 of the *Agency Guide to the Public Interest Disclosure Act 2013* (Version 2), even though the Public Interest Disclosure Act 2013 (Cth) "does not define when an investigation or action taken by an agency as a result of the investigation is inadequate ... an investigation is likely to be considered inadequate if information that was reasonably available, relevant and materially significant was not obtained."

[398] Moreover, and in the same part of the *Agency Guide to the Public Interest Disclosure Act 2013* (Version 2), the following is noted:

[s]ome pitfalls for agencies to avoid when investigating a disclosure include ... not pursuing obvious lines of enquiry (sic).

[399] Ms McMullan's failure to address the allegation **demonstrates** the inadequacy of public interest disclosure investigation. It was not appropriate for Mr Anstey to terminate his investigation into Ms McMullan's failure to address the allegation without providing adequate reasons as to why Ms McMullan's failure to investigate the allegation that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct by misleading a Federal Court judge about the selection process pertaining to the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in the Queensland District Registry was, in Mr Anstey's confused and ill-informed opinion, permissible.

#### Relief sought

[400] I request that:

a) Mr Anstey's decision to terminate the investigation under the *Ombudsman Act 1976* (Cth) be set aside on the basis of the grounds of review;

b) the Ombudsman make a finding that Kate McMullan's finding that "material provided by FCA also indicates that, following the advertisement of [the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in the Queensland District Registry] and the finalisation of the recruitment process, a role review was undertaken" was not based on any cogent or probative evidence;<sup>305</sup>

c) the Ombudsman make a finding that Kate McMullan's finding that there was "no indication amongst the materials provided that Mr Belcher or Mr Trott were particularly targeted for reclassification of their roles" is, in the light of the evidence, unjustified;

d) the Ombudsman make a finding that Kate McMullan's finding that "[t]he evidence provided does not support a finding that [the reclassification] had occurred to create SESB1 positions for Ms O'Connor [amongst others] ..." is unjustified because, first, there is no evidence that there was a reclassification of the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Queensland, and, second, because the Senior Executive Band 1 classification that should have been allocated to Mr Belcher under rule 6 of the *Public Service Classification Rules 2000* (Cth) was "transferred" to Sydney and awarded to a person who was chosen to fill a vacancy for a Senior Executive Band 1 National Judicial Registrar role that was never notified in the Public Service Gazette;

e) the Ombudsman make a finding that Kate McMullan contravened her statutory duty, under the *Public Interest Disclosure Act 2013* (Cth), by functionally refusing to investigate the disclosable conduct that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct by misleading a Federal Court judge about the selection process pertaining to the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in the Queensland District Registry;

f) the Ombudsman make a finding that Kate McMullan failed to comply with procedures established under subsection 15(3) of the *Public Service Act 1999* (Cth) in investigating alleged breaches of the Code of Conduct and had thus failed to comply with paragraph 53(5)(b) of the *Public Interest Disclosure Act 2013* (Cth);

g) the Ombudsman prepare a report of his findings, and refer the matter back to the Australian Public Service Commissioner with a recommendation that the Commissioner reinvestigate the public interest disclosure according to law.

#### **4. THE DECISION TO “PROMOTE” RUSSELL TROTT**

##### Allegation

[401] In essence, I alleged that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they conspired to deny a candidate, who had been selected for promotion, by a selection committee, to a Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in the Queensland District Registry of the Federal Court, promotion to the Senior Executive Service of the Australian Public Service so that the scarce Senior Executive Band 1 classification could be allocated to somebody else under rule 6 of the *Public Service Classification Rules 2000* (Cth).

##### Salient facts

[402] A Senior Executive Service Band 1 classified National Judicial Registrar & District Registrar vacancy in the Western Australia District Registry of the Federal Court was notified in the Public Service Gazette.<sup>[306](#)</sup>

[403] According to the selection report for the Senior Executive Service Band 1 classified National Judicial Registrar & District Registrar vacancy in the Western Australia District Registry of the Federal Court, 6 candidates were shortlisted for interview.<sup>[307](#)</sup>

[404] A selection committee consisting of Sia Lagos, the current Chief Executive Officer and Principal Registrar of the Federal Court, David Pringle, the current Chief Executive Officer and Principal Registrar of Division 1 of the Federal Circuit and Family Court, and Andrea Jarratt, the current Director of National Operations in the Federal Court, selected *Gamma* as a “recommended candidate” for promotion to the Senior Executive Service Band 1 classified National Judicial Registrar & District Registrar vacancy in the Western Australia District Registry.<sup>[308](#)</sup> Sia Lagos, David Pringle and Andrea Jarratt certified reading the selection report and agreeing with the contents of the report.<sup>[309](#)</sup> They also certified being “aware of the correct policy and procedures for merit selection and certify that these have been followed”.<sup>[310](#)</sup>

[405] Sia Lagos, in her capacity as the then Agency Head's delegate, endorsed the decision of the selection committee to selection Russell Trott for promotion to the Senior Executive Service Band 1 classified National Judicial Registrar & District Registrar vacancy in the Western Australia District Registry of the Federal Court. [311](#)

[406] Kerryn Vine-Camp, the then First Assistant Commissioner of the Australian Public Service Commission, was, for the purposes of section 21 of the *Australian Public Service Commissioner's Directions 2016* (Cth), a full participant in the selection process for the Senior Executive Service Band 1 classified National Judicial Registrar & District Registrar vacancy in the Western Australia District Registry of the Federal Court. [312](#)

[407] On 12 October 2018, a document purporting to be an arrangement for the permanent re-assignment of duties under section 25 of the Public Service Act 1999 (Cth) was issued to Russell Trott By Warwick Soden. [313](#) The document purported to re-assign Mr Trott's duties "at level" at the Executive Level 2 classification that had been allocated to him. [314](#) Mr Trott signed the document and dated it on 6 November 2018. [315](#)

[408] On 25 October 2018, the representative of the Australian Public Service Commissioner for the purposes of the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – WA selection process, Ms Kerryn Vine-Camp, the then First Assistant Commissioner of the Australian Public Service Commission, certified that she had participated in all stages of the selection process, and that the selection process complied with subsection 10A(2) of the *Public Service Act 1999* (Cth) and the *Australian Public Service Commissioner's Directions 2016* (Cth). [316](#)

#### Findings and outcomes of the Kate McMullan's investigation under the *Public Interest Disclosure Act 2013* (Cth)

[409] The investigator, Kate McMullan, made several findings.

[410] In response to the allegation that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they conspired to deny Russell Trott promotion to the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in the Western Australia District Registry of the Federal Court so that the scarce Senior Executive Band 1 classification could be allocated to somebody else under rule 6 of the *Public Service Classification Rules 2000* (Cth), Ms McMullan made the following finding:

I found no indication amongst the materials provided that Mr Belcher or Mr Trott were particularly targeted for reclassification of their roles. The evidence provided does not support a finding that this had occurred to create SESB1 positions for Ms O'Connor [amongst others] ... [317](#)

[411] Ms McMullan's reasons for this finding are:

The material provided by FCA does indicate that Mr Belcher and Mr Trott applied for SESB1 positions and were ultimately placed into Legal 2 positions. However material provided by FCA also indicates that, following the advertisement of these positions and the finalisation of the recruitment process, a role review was undertaken ... The evidence provided indicates that as a result of a role review, a determination was made that NJR positions could be held at the SESB1 level in some registrars, and at the Legal 2 level in other registrars.

The material provided about this review indicates that these decisions were made on the basis of the relative volume and work undertaken in the various registrars (*sic*). [318](#)

Errors alleged to have been committed by the investigator in complaint lodged with the Office of the Commonwealth Ombudsman on 26 October 2021

[412] Ms McMullan had made many errors. A selection of the errors are set out.

[413] First, there are problems with Ms McMullan's finding that "following the advertisement of [the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – QLD and the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – WA] positions and the finalisation of the recruitment process, a role review was undertaken." [319](#) Specifically, in order for Ms McMullan's finding to be correct, it must be the case that a role review was undertaken, and that the role review was undertaken after a) the advertisement of the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – QLD and the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – WA positions, and b) the finalisation of the recruitment processes for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – QLD and the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – WA positions. [320](#)

[414] There was no evidence before Ms McMullan demonstrating that a role review had taken place for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – QLD or the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – WA positions. [321](#)

[415] Second, and related to the first point, Ms McMullan’s claim that “as a result of a role review, a determination was made that NJR positions could be held at the SESB1 level in some registrars, and at the Legal 2 level in other registrars” was unsupportable because a causal relationship existing between a “role review” and the “determination” that “NJR positions could be held at the SESB1 level in some registrars, and at the Legal 2 level in other registrars” could only be an actuality if there had actually been a role review, which was not the case. [322](#)

[416] Third, I challenged Ms McMullan’s findings that:

a) there was “no indication amongst the materials provided that Mr Belcher or Mr Trott were particularly targeted for reclassification of their roles”; and

b) the “evidence provided does not support a finding that [the “reclassifications”] had occurred to create SESB1 positions for Ms O’Connor [amongst others] ...” [323](#)

[417] There were many indications amongst the materials provided that Mr Belcher and Mr Trott were particularly targeted for reclassification of their roles, and that the evidence did support a finding that the “reclassifications” had occurred to create SESB1 positions for others, including Ms O’Connor. [324](#)

#### Findings and outcomes of the investigation conducted by Mark Anstey of the Office of the Commonwealth Ombudsman

[418] On 12 December 2022, Mark Anstey, an acting Assistant Director in the Public Interest Disclosure Team of the Ombudsman’s Office, terminated an investigation, under the *Ombudsman Act 1976* (Cth), into the errors alleged to have been committed by Ms McMullan. [325](#)

[419] Mr Anstey claimed that the Ombudsman “cannot take any action that would cause an agency to reinvestigate a [public interest disclosure] ... because the [Public Interest Disclosure Act 2013 (Cth)] does not provide a mechanism for a finalised PID investigation to be reopened.” [326](#) The falsehood of that legal proposition has been part IV of this email.

[420] Mr Anstey claimed “most of the key findings were not unreasonable for the investigating agency to make.”<sup>327</sup> That proposition is false, not least for the reasons set out in part XI of this email. Further reasons demonstrating the falsehood of that proposition will be set out below.

[421] Mr Anstey concluded that “there is no practical outcome [the Ombudsman] could obtain by further investigating the complaint”, which, as I have demonstrated in part V of this email, is a falsehood, and, on that basis, terminated the investigation into the errors alleged to have been committed by Ms McMullan.<sup>328</sup>

[422] In terminating the investigation, Mr Anstey stated: <sup>329</sup>

I understand your view that there was not a properly documented review of roles and classifications that would allow an Agency Head to appoint individuals to the relevant position at SES1 or EL2 level.

Conducting and documenting a role review is not set down in legislation. The APS Classification Guide recommends a role review or role evaluation be carried out in certain circumstances, including reviews conducted because of a restructure or reorganisation within an agency. That said, ultimately it is at the discretion of the Agency Head to determine the duties of an employee and determine an appropriate classification based on those duties.

The PID Investigator concluded the material available indicated there had been a role review and the decision to reclassify these positions was made “*on the basis of the relative volume and complexity of work undertaken in the various registrars (sic)*”. I accept that you dispute this. I also appreciate the reasons for the decision could have been better communicated to agency staff, as the PID Investigator noted, and similarly the internal records could have been more detailed. It nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented.

[423] Mr Anstey also stated: <sup>330</sup>

In my view, it was reasonably open to the PID Investigator to conclude there was no indication that particular applicants were targeted to have the roles they applied for, and to which they were ultimately appointed, reclassified to be suited to those at EL2 level. I agree with the PID Investigator’s conclusion that the primary lesson to learn from this part of the recruitment process was that the agency should have more clearly communicated with staff about the role review process and what led to the decision to classify certain roles at either EL2 or SES level.

Grounds of review in respect of the decision to terminate the Ombudsman's investigation

[424] My grounds of review are as follows:

- 1) Mr Anstey's claim that "[t]he APS Classification Guide *recommends* a role review or role evaluation be carried out in certain circumstances ..." is false;
- 2) Mr Anstey's claim that "[c]onducting and documenting a role review is not set down in legislation" is stunted and misinformed because the legal obligation to conduct and document a role review is legislatively mandated;
- 3) Mr Anstey's claim that "ultimately it is at the discretion of the Agency Head to determine the duties of an employee and determine an appropriate classification based on those duties" is false;
- 4) Mr Anstey's claim that "[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented" is unjustifiable;
- 5) Mr Anstey's claim that "it was reasonably open to the PID Investigator to conclude there was no indication that particular applicants were targeted to have the roles they applied for, and to which they were ultimately appointed, reclassified to be suited to those at EL2 level" is unjustifiable;
- 6) The fact that Mr Anstey was unperturbed by Ms McMullan's finding that a "decision to reclassify these positions was made *on the basis of the relative volume and complexity of work undertaken in the various registrars (sic)*" demonstrates a failure on Mr Anstey's part to understand how classification decisions are to be made;
- 7) Mr Anstey's failure to address Ms McMullan's failure to investigate the allegation that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they conspired to deny a candidate, who had been selected for promotion, by a

selection committee, to a Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in the Western Australia District Registry of the Federal Court, promotion to the Senior Executive Service of the Australian Public Service so that the scarce Senior Executive Band 1 classification could be allocated to somebody else under rule 6 of the *Public Service Classification Rules 2000* (Cth).

#### *Ground 1*

[425] I adopt the reasoning in paragraphs [292] – [301].

#### *Ground 2*

[426] I adopt the reasoning in paragraphs [312] – [314].

#### *Ground 3*

[427] I adopt the reasoning in paragraphs [315] – [318].

#### *Ground 4*

[428] Mr Anstey’s claim that “[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented” is unjustifiable.

[429] I repeatedly noted, in the complaint lodged with the Office of the Commonwealth Ombudsman on 26 October 2021, that there was no evidence before Ms McMullan that a role review of the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in the Western Australia District Registry had ever been conducted, and that Ms McMullan’s claims that a role review of the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in the Western Australia District Registry had been conducted “following the advertisement of [the

Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in the Queensland District Registry] and the finalisation of the recruitment process” were not based on any cogent or probative evidence.<sup>331</sup>

[430] In response to a freedom of information request for access to “[t]he role evaluation records prepared between 1 January 2017 and 31 December 2020, that show that the SES Band 1 classified National Judicial Registrar & District Registrar role in Western Australia was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the Public Service Classification Rules 2000”,<sup>332</sup> an authorised officer in the Federal Court of Australia had refused to grant access because the role evaluation records do not exist.<sup>333</sup>

[431] I note that Ms McMullan had completed her public interest disclosure investigation on 9 December 2020 and, thus, could not have relied on documents prepared after that date to conclude that there was a review conducted as the Agency Head of the Federal Court and that the decision was, as Mr Anstey claimed, documented. I also note that Ms McMullan had found that “following the advertisement of these positions and the finalisation of the recruitment process, a role review was undertaken ...” The recruitment process for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in Western Australia had been finalised on 25 October 2018, when the Australian Public Service Commissioner's representative certified that she had been a full participant in the selection process, and that the selection process complied with subsection 10A(2) of the *Public Service Act 1999* (Cth) and the *Australian Public Service Commissioner's Directions 2016* (Cth).

[432] How Mr Anstey could have found that it was “reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented” when an official in the Federal Court of Australia has explicitly conceded that no role evaluation records that show that the SES Band 1 classified National Judicial Registrar & District Registrar role in Western Australia was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the *Public Service Classification Rules 2000* existed, even though it is mandatory for such records to be prepared and maintained is beyond me. In the absence of records showing that the SES Band 1 classified National Judicial Registrar & District Registrar role in Western Australia was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the *Public Service Classification Rules 2000*, I challenge how it is that Mr Anstey could claim to have access to the Agency Head's documented decision demonstrating that “the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level ...” I will submit a freedom of information request for access to the document that Mark Anstey claims evidences that fact that “the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level ...”

[433] Given that “[t]he role evaluation records prepared between 1 January 2017 and 31 December 2020, that show that the SES Band 1 classified National Judicial Registrar & District Registrar role in Western Australia was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the Public Service Classification Rules 2000” do not exist, Mr Anstey’s claim that “[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented” contradicts the public and humiliating concession of the Federal Court of Australia and, being contradictory, is plainly unjustifiable.

#### *Ground 5*

[434] I challenge Mr Anstey’s claim that “it was reasonably open to the PID Investigator to conclude there was no indication that particular applicants were targeted to have the roles they applied for, and to which they were ultimately appointed, reclassified to be suited to those at EL2 level” because I provided at least four items of documentary evidence to the Office of the Commonwealth Ombudsman, when a complaint was lodged on 26 October 2021, indicating that the Senior Executive Band 1 classification that should have been allocated to Mr Trott, under rule 6 of the *Public Service Classification Rules 2000* (Cth), was allocated to a person who did not apply for the position she was ultimately engaged to fill, as alleged.

[435] The first document is a document titled *Judicial Registrar Recruitment*. [334](#)

[436] The second document is an email from Warwick Soden to Sia Lagos, Catherine Sullivan and Darrin Moy dated 25 September 2018. [335](#)

[437] The third document is an email sent by Warwick Soden to Darrin Moy on 15 October 2018. [336](#)

[438] The fourth document is document titled *Judicial Registrar Recruitment – Budget*, [337](#) which was attached to an email sent from Sia Lagos to Catherine Sullivan, Darrin Moy and Andrea Jarratt on 5 October 2018. [338](#)

#### *A. Judicial Registrar Recruitment document*

[439] I draw your attention to the eight page *Judicial Registrar Recruitment* document.

[440] The document commences as follows:

Further to my memorandum of 22 August 2018 regarding the registrar recruitment exercise, this paper provides a further update on the recruitment exercise and recommendations endorsed by the recruitment panel for the appointment of candidates to the Senior National Judicial Registrar (SES2), National Judicial Registrar & District Registrar - VIC, QLD and WA (SES1), Judicial Registrar & District Registrar - TAS (Legal 2) and National Judicial Registrar – Native Title (SES1) positions, subject to your consideration and approval.

[441] The discloser drew attention to the fact that the National Judicial Registrar & District Registrar role in the Western Australia District Registry of the Federal Court bears a Senior Executive Band 1 classification according to the author of the document.

[442] Among other things, the author of the document sets out, in a table commencing on page 4, Federal Court registrar roles for which recruitment processes had been undertaken, and identifies the candidates selected by the selection committees for the relevant registrar roles in the Federal Court.

[443] One of the roles identified in the table is the “National Judicial Registrar & District Registrar – WA Registry (SES1).” I draw your attention to the fact that the National Judicial Registrar & District Registrar role in the Western Australia District Registry of the Federal Court bears a Senior Executive Band 1 classification in the table.

[444] The names of three lead candidates are set out in the column next to the position, and comments are set out in relation to the lead candidates in a column next to their names. The name of the candidate selected by the selection committee consisting of Sia Lagos, David Pringle and Andrea Jarratt to fill the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in the Western Australia District Registry of the Federal Court is Russell Trott. <sup>339</sup> Kerryn Vine-Camp, the Australian Public Service Commissioner’s representative for the purposes of the selection process for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in the Western Australia District Registry, certified that she had been a full participant in the selection process, and that the selection process complied with subsection 10A(2) of the *Public Service Act 1999* (Cth) and the *Australian Public Service Commissioner’s Directions 2016* (Cth). <sup>340</sup>

[445] In the column next to Mr Trott’s name is the following typed comment:

Appoint to position.

Russell's existing Judicial Registrar (Legal 2) position: backfill with Matthew Benter.

[446] Next to the typed comment is a handwritten note – “No SES BUT DR IFA”.

[447] On the eighth page of the document is a handwritten note, which reads:

Sia

Changes to be managed within 17/18 NOR appropriation. Proposed recruitment approved subject to me seeing & approving reconciliation of costs against budget by Finance Dept (Kat Hunter & Catherine Sullivan).

SES positions WA & QLD not to be filled – positions to be transferred to Sydney – WA & QLD DRs to be filled at Legal 2 with allowance (IFAs) if possible.

[448] The document was signed by Warwick Soden and dated “25/9/18”.

[449] Contrary to Mr Anstey's claim, it was not reasonably open to the PID Investigator to conclude there was no indication that particular applicants were targeted to have the roles they applied for, and to which they were ultimately appointed, reclassified to be suited to those at EL2 level.

[450] First, it is plain that National Judicial Registrar & District Registrar role in the Western Australia District Registry of the Federal Court bore a Senior Executive Band 1 classification in the document.<sup>341</sup>

[451] It is also plain that there had been no re-evaluation of the role such that the role could bear an Executive Level 2 or “Legal 2” classification. That is clear not only because a decision maker in the Federal Court has confirmed that “role evaluation records prepared between 1 January 2017 and 31 December 2020, that show that the SES Band 1 classified National Judicial Registrar & District Registrar role in Western Australia was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2

classification for the purposes of rule 9 of the Public Service Classification Rules 2000” do not exist.<sup>342</sup> It is clear because Mr Soden refers explicitly to the “SES positions in WA & QLD” in his notes.<sup>343</sup> Had the National Judicial Registrar & District Registrar positions in Western Australia and Queensland been lawfully reclassified to bear Executive Level 2 classifications, then Mr Soden would not have referred to the positions as SES positions.

[452] Second, Mr Soden explicitly states that the “WA & QLD DRs to be filled at Legal 2 with allowance (IFAs) if possible.”<sup>344</sup> Moreover, Mr Soden explicitly noted, next to Mr Trott’s name, “No SES BUT DR IFA.”<sup>345</sup> “DRs” is an abbreviation for District Registrars, and that “IFA” is an abbreviation for *independent flexibility arrangement*, which is an arrangement “enabling an employee and his or her employer to agree on an arrangement varying the effect of the agreement in relation the employee and the employer, in order to meet the genuine needs of the employee and employer.”<sup>346</sup>

[453] An IFA applies between an employer and an employee; it has nothing to do with the allocation of an approved classification, under **rule 9** of the *Public Service Classification Rules 2000* (Cth), to each group of duties to be performed in the Federal Court based on the work value of the group of duties described in the work level standards for a particular classification. In other words, consideration of an IFA or its use is of no relevance to the allocation of an approved classification, under rule 9 of the *Public Service Classification Rules 2000* (Cth), to each group of duties to be performed in any agency.

[454] Given that an IFA applies between an employer and an employee, and the IFA was to be offered to supplement the Legal 2 classification allocated to the “WA & QLD DRs”, the natural conclusion to draw would be that Mr Soden had decided to allocate an Executive Level 2 (i.e. Legal 2) classification to Russell Trott, upon his “promotion” to the National Judicial Registrar & District Registrar role in Western Australia, pursuant to **rule 6** of the *Public Service Classification Rules 2000* (Cth), which requires an Agency Head to “allocate an approved classification to each APS employee in the Agency.”

[455] Mr Soden’s decision was problematic because the classification allocated to Mr Trott under **rule 6** of the *Public Service Classification Rules 2000* (Cth) did not match the classification that had been allocated to the groups of duties associated with the National Judicial Registrar & District Registrar role in Western Australia under **rule 9** of the *Public Service Classification Rules 2000* (Cth).<sup>347</sup> The National Judicial Registrar & District Registrar role in Western Australia bore, and continues to formally bear, a Senior Executive Band 1 classification and the National Judicial Registrar & District Registrar role in Western Australia has never been the subject of a role re-evaluation (i.e. role review), by which the National Judicial Registrar & District Registrar role was reclassified to bear an Executive Level 2 (i.e. Legal 2) classification.<sup>348</sup>

[456] Third, Mr Soden explicitly states that the SES “positions [are] to be transferred to Sydney.” <sup>349</sup> This could not possibly mean that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar roles in the Queensland and Western Australia District Registries would be transferred to Sydney because a District Registrar is, by law, required to be located in the District Registry of the relevant State. <sup>350</sup> Rather, and as is the case, the National Judicial Registrar & District Registrar of Western Australia is based in the Western Australia District Registry, and the classification that would have been allocated to him under rule 6 of the *Public Service Classification Rules 2000* (Cth) was allocated to a person based in Sydney.

[457] Since:

a) there was no evidence before Ms McMullan that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Western Australia had been the subject of a role re-evaluation (i.e. a role review) such that the groups of duties to be performed by the National Judicial Registrar & District Registrar in Western Australia should have, on the evidence and in the light of the Commissioner’s work level standards, be allocated an Executive Level 2 classification; and

b) a decision maker in the Federal Court has explicitly acknowledged that role evaluation records showing that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Western Australia was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, ever reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the *Public Service Classification Rules 2000* do not exist; <sup>351</sup> and

c) Warwick Soden decided to allocate an Executive Level 2 classification to Russell Trott on 25 September 2018 and, on 12 October 2018 did, in fact, allocate an Executive Level 2 classification to Russell Trott, even though the National Judicial Registrar & District Registrar role in Western Australia bore, and continued to bear, a Senior Executive Band 1 classification; <sup>352</sup> and

d) Warwick Soden explicitly stated that the SES “positions [are] to be transferred to Sydney”, <sup>353</sup> where, as would become apparent, there were proposals to allocate two Senior Executive Band 1 classifications to individuals who did not apply for the roles they were offered because those roles were not notified to the public according to law, <sup>354</sup>

it was not, as Mr Anstey claimed, “reasonably open to the PID Investigator to conclude there was **no indication** that particular applicants were targeted to have the roles they applied for, and to which they were ultimately appointed, reclassified to be suited to those at EL2 level.”

B. Email from Warwick Soden to Sia Lagos, Catherine Sullivan and Darrin Moy dated 25 September 2018

[458] I draw your attention to the substance of an email that Warwick Soden sent to Sia Lagos, Catherine Sullivan and Darrin Moy on 25 September 2018, the same day that he set out his notations on the *Judicial Registrar Recruitment* document. [355](#)

[459] The emails reads as follows: [356](#)

My reference in my hand written comments on the document discussed with Sia a copy of which I gave to Darrin referred to 17/18 budget. It should have been the approved 18/19 budget. No confusion or “mischief” intended.

[460] I question how Mr Anstey could have concluded that it was “reasonably open to the PID Investigator to conclude there was **no indication** that particular applicants were targeted to have the roles they applied for, and to which they were ultimately appointed, reclassified to be suited to those at EL2 level” when Mr Soden had, impishly, claimed that there was no mischief intended in allocating an Executive Level 2 classification to Russell Trott, even though the role he had been selected for promotion to was classified, and remained classified, at the Senior Executive Band 1 classification level, and where it was clear that the Senior Executive Band 1 classification that should have been allocated to Mr Trott under **rule 6** of the *Public Service Classification Rules 2000* (Cth) had been “transferred to Sydney”.

C. Email from Warwick Soden to Darrin Moy dated 15 October 2018

[461] The discloser drew Mr Anstey’s attention to an email that Warwick Soden had forwarded to Darrin Moy, which contained Justice Greenwood’s email of 14 October 2018 in the email chain. The email reads as follows: [357](#)

Darrin

Any suggestions? This is keeping me awake!!!!!!!

Have the 2 people to be appointed in Sydney been given offers for the ses positions? Have they accepted? Would the APSC agree to give us 2 new SES positions? Hold firm? Does Sia have suggestions?

Warwick

[462] Given that I had alleged that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they conspired to deny a candidate, who had been selected for promotion, by a selection committee, to a Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in the Western Australia District Registry of the Federal Court, promotion to the Senior Executive Service of the Australian Public Service so that the scarce Senior Executive Band 1 classification could be allocated to somebody else under rule 6 of the *Public Service Classification Rules 2000* (Cth), I question how Mr Anstey could have concluded that it was “reasonably open to the PID Investigator to conclude there was **no indication** that particular applicants were targeted to have the roles they applied for, and to which they were ultimately appointed, reclassified to be suited to those at EL2 level”, particularly when:

a) it was apparent that Warwick Soden explicitly acknowledged that two people in Sydney were to be appointed to SES positions, [358](#) even though there was no evidence that the two SES positions in Sydney had been notified to the public; and

b) Warwick Soden had explicitly noted that “SES positions WA & QLD not to be filled – positions to be transferred to Sydney – WA & QLD DRs to be filled at Legal 2 with allowance (IFAs) if possible”; [359](#) and

c) Mr Soden had allocated an Executive Level 2 classification to Mr Trott, under **rule 6** of the *Public Service Classification Rules 2000* (Cth), [360](#) which did not match the Senior Executive Band 1 classification that had been allocated to the groups of duties associated with the National Judicial Registrar & District Registrar role in Western Australia under **rule 9** of the *Public Service Classification Rules 2000* (Cth); [361](#) and

d) a decision maker in the Federal Court of Australia has, in response to a freedom of information request for access to “[t]he role evaluation records prepared between 1 January 2017 and 31 December 2020, that show that the SES Band 1 classified National Judicial Registrar & District Registrar role in Western Australia was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the *Public Service Classification Rules 2000*”, [362](#) confirmed that the role evaluation records do not exist. [363](#)

*D. Judicial Registrar Recruitment – Budget document*

[463] I draw your attention to page eight of the *Judicial Registrar Recruitment* document and, specifically, Mr Soden’s handwritten comments, which read: [364](#)

Sia

Changes to be managed within 17/18 NOR appropriation. Proposed recruitment approved subject to me seeing & approving reconciliation of costs against budget by Finance Dept (Kat Hunter & Catherine Sullivan) ...

[464] On 5 October 2018, Sia Lagos sent an email to Catherine Sullivan, The Executive Director of Corporate Services in the Federal Court. [365](#) The email was copied to Darrin Moy, the Federal Court’s Executive Director of People, Culture and Communications, and Andrea Jarratt, the Director of National Operations. [366](#) The email reads: [367](#)

... I have just had a meeting with Darrin regarding the proposal and proposed remuneration offers and he supports the proposal. I understand that Warwick has requested from you a reconciliation of the resourcing costs in terms of the NOR Budget for 2018/2019.

Can you please review the proposal and advise that the resourcing can be accommodated within the NOR Budget for 2018/2019.

[465] Attached to the email was the *Judicial Registrar Recruitment – Budget* document. [368](#)

[466] The *Judicial Registrar Recruitment – Budget* document sets out the details of individuals who were “successful candidates” in the registrar recruitment exercise undertaken by the Court. [369](#)

[467] As expected, Murray Belcher and Russell Trott are, respectively, listed as the successful candidates for the National Judicial Registrar and District Registrar positions in the Queensland and Western Australia District Registries of the Federal Court. [370](#) Not so expectedly, both Mr Belcher and Mr Trott are listed as having been allocated “Legal 2” classifications. [371](#)

[468] Curiously, two names have been included on the list of successful candidates. The first name is Susan O’Connor and the second is Drew Pearson. [372](#)

[469] I again draw your attention to the *Judicial Registrar Recruitment* document. [373](#)

[470] Among other things, the author of the document sets out, in a table on page 4, Federal Court registrar roles for which recruitment processes had been undertaken, and identifies the candidates selected by the selection committees for the relevant registrar roles in the Federal Court.

[471] One of the roles identified in the table is the “Senior National Judicial Registrar (SES2).” [374](#) The discloser drew Mr Anstey’s attention to the fact that the Senior National Judicial Registrar role bears a Senior Executive Band 2 classification. [375](#)

[472] The names of three lead candidates are set out in the column next to the position, and comments are set out in relation to the lead candidates in a column next to their names. The name of the candidate selected by the selection committee consisting of Sia Lagos, David Pringle and Andrea Jarratt to fill the Senior Executive Band 2 classified Senior National Judicial Registrar role is Paul Farrell. [376](#) The names of candidates who were unsuccessful are also listed. [377](#) Among the unsuccessful candidates were Susan O’Connor, “Principal of Griffith Hack Lawyers since 2014”, and Drew Pearson, “Partner at Herbert Smith Freehills since 2013”. [378](#) Both are listed as being based in Sydney. [379](#)

[473] In the column next to Ms O’Connor’s name is the following typed comment: [380](#)

Appoint to a new Judicial Registrar – Legal 2 position (Syd). Would require allowance equivalent to SES1 or higher. Additional cost unless resource allocation scenario is applied (see section below).

[474] Next to the typed comments is a handwritten note, which reads “IFA OK (Funds).”

[475] In the column next to Ms Pearson’s name is the following typed comment:

Appoint to a new Judicial Registrar – Legal 2 position (Syd). Would require allowance equivalent to SES1 or higher. Additional cost unless resource allocation scenario is applied (see section below).

[476] Next to the typed comments is a handwritten note, which reads “IFA OK (Funds).” [381](#)

[477] It is readily apparent that, despite failing to secure the Senior Executive Band 2 classified Senior National Judicial Registrar role they applied for, Ms O’Connor and Mr Pearson were to be offered “Legal 2” positions in Sydney, each with an “allowance equivalent to SES1 or higher.” [382](#) It is also clear that the mechanism to be used to secure this higher allowances would be an individual flexibility arrangement, which, according to clause 4.1 of the *Federal Court of Australia Enterprise Agreement 2018-2021* [2018] FWCA 4493, does not apply to Senior Executive Service employees.

[478] Yet, almost magically, according to *Judicial Registrar Recruitment – Budget* document, Susan O’Connor and Drew Pearson were the “successful candidates” for Senior Executive Band 1 classified National Judicial Registrar vacancies in Sydney. [383](#)

[479] It is, at this point, worth noting that, in response to a freedom of information request for access to the “SES Band 1 classified National Judicial Registrar vacancy notification, published in the Public Service Gazette, that Susan O’Connor was selected to fill in the course of a merit based selection process ...”, [384](#) an authorised decision maker in the Federal Court refused access to the document because the document does not exist. [385](#)

[480] Moreover, in response to a freedom of information request for access to “the job application submitted for the National Judicial Registrar role that Susan O’Connor was selected to fill”, [386](#) National Judicial Registrar & District Registrar Nicola Colbran, the most senior Federal Court registrar in South Australia, refused to provide access to the document, pursuant to section 24A of the *Freedom of Information Act 1982* (Cth), because the document cannot be found or does not exist. [387](#)

[481] According to the *Judicial Registrar Recruitment – Budget* document, Susan O’Connor appears to have accepted the Senior Executive Band 1 classified National Judicial Registrar role in Sydney, [388](#) while Drew Pearson appears to have declined the offer for the Senior Executive Band 1 classified National Judicial Registrar role in Sydney. [389](#)

[482] Nonetheless:

a) despite the fact that in response to a freedom of information request for access to “[t]he role evaluation records prepared between 1 January 2017 and 31 December 2020, that show that the SES Band 1 classified National Judicial Registrar & District Registrar role in Western Australia was, in

light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the Public Service Classification Rules 2000”, [390](#) an authorised officer in the Federal Court of Australia confirmed that the role evaluation records do not exist; [391](#) and

b) despite the fact that Warwick Soden noted “SES positions WA & QLD not to be filled – positions to be transferred to Sydney – WA & QLD DRs to be filled at Legal 2 with allowance (IFAs) if possible”; [392](#)

c) despite the fact that, had the Senior Executive Band 1 classified National Judicial Registrar and District Registrar roles in the Queensland and Western Australia District Registries actually been subjected to role reviews and been reclassified to bear Executive Level 2 classification, Mr Soden would not have had any cause to refer to the transfer of “SES positions in WA & QLD” to Sydney; and

d) despite the fact that an independent flexibility arrangement cannot be allocated to a group of duties under **rule 9** of the *Public Service Classification Rules 2000* (Cth), and can only be entered into with a natural person and, in this instance, was to be used to supplement the classification allocated to Mr Trott under rule 6 of the *Public Service Classification Rules 2000* (Cth); and

e) despite the fact that there was no evidence before Ms McMullan that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Western Australia had been the subject of a role re-evaluation (i.e. a role review) such that the groups of duties to be performed by the National Judicial Registrar & District Registrar in Western Australia should, on the evidence and in the light of the Commissioner’s work level standards, be allocated an Executive Level 2 classification; [393](#) and

f) despite the fact that Mr Soden had, impishly, claimed that there was no mischief intended in allocating an Executive Level 2 classification to Russell Trott, [394](#) even though the role he had been selected for promotion to was classified, and remained classified, at the Senior Executive Band 1 classification level; and

g) despite the fact that Russell Trott was selected by a selection committee consisting of Sia Lagos, David Pringle and Andrea Jarratt, for promotion to the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Western Australia, [395](#) and despite the fact that Sia Lagos endorsed, as the Agency Head’s delegate, the selection committee’s decision to promote Russell Trott to the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Western Australia, [396](#) and despite the fact that, on 25 October 2018, Kerry Vine-Camp certified that she had been a full participant in the selection process for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Western Australia and that

the process complied with subsection 10A(2) of the *Public Service Act 1999* (Cth) and the *Australian Public Service Commissioner's Directions 2016* (Cth), [397](#) in the *Judicial Registrar Recruitment – Budget* document, which was sent by Sia Lagos to Catherine Sullivan, among others, on 5 October 2018, Russell Trott is listed as the “successful candidate” for a “Legal 2” classified National Judicial Registrar & District Registrar role in Western Australia, [398](#) even though the Federal Court has explicitly acknowledged that no record of role evaluation documents, which were prepared between 1 January 2017 and 31 December 2020, showing that the SES Band 1 classified National Judicial Registrar & District Registrar role in Western Australia was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the Public Service Classification Rules 2000 exists; [399](#) and

h) despite the fact that Susan O'Connor and Drew Pearson had both failed to secure the Senior Executive Band 2 classified Senior National Judicial Registrar role, [400](#) and despite the fact that Susan O'Connor and Drew Pearson were to, as consolation, be offered “Legal 2” Judicial Registrar roles in Sydney, [401](#) both Susan O'Connor and Drew Pearson were, in the *Judicial Registrar Recruitment – Budget* document prepared by Sia Lagos, listed as being the “successful candidates” for Senior Executive Band 1 classified National Judicial Registrar roles based in Sydney; [402](#) and

i) despite the fact that an official in the Federal Court has acknowledged that the “SES Band 1 classified National Judicial Registrar vacancy notification, published in the Public Service Gazette, that Susan O'Connor was selected to fill in the course of a merit based selection process ...” does not exist; [403](#)

j) despite the fact that an official in the Federal Court has acknowledged that “the job application submitted for the National Judicial Registrar role that Susan O'Connor was selected to fill” does not exist or cannot be found; [404](#) and

k) despite the fact that Mr Soden, in an email sent on 15 October 2018, confessed the “transfer” of the “SES positions WA & QLD” to Sydney was keeping him awake at night, [405](#)

Mr Anstey's view is that “it was reasonably open to the PID Investigator to conclude there was **no indication** that particular applicants were targeted to have the roles they applied for, and to which they were ultimately appointed, reclassified to be suited to those at EL2 level.” **No indication** that applicants were targeted to have the roles they applied for, and to which they were ultimately appointed, reclassified to be suited to those at EL2 level? Only if you are a mandarin with the acuity of a kumquat.

[483] Plainly, Mr Anstey’s view that “it was reasonably open to the PID Investigator to conclude there was **no indication** that particular applicants were targeted to have the roles they applied for, and to which they were ultimately appointed, reclassified to be suited to those at EL2 level” is unjustifiable because, for the reasons set out above, there is ample evidence indicating “that particular applicants were targeted to have the roles they applied for, and to which they were ultimately appointed, reclassified to be suited to those at EL2 level.”

[484] More to the point, there is ample evidence indicating that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they conspired to deny a candidate, who had been selected for promotion, by a selection committee, to a Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in the Western Australia District Registry of the Federal Court, promotion to the Senior Executive Service of the Australian Public Service so that the scarce Senior Executive Band 1 classification could be allocated to somebody else under rule 6 of the *Public Service Classification Rules 2000* (Cth).

## Ground 6

[485] The fact that Mr Anstey was unperturbed by Ms McMullan’s finding that a “decision to reclassify these positions was made **on the basis of the relative volume and complexity of work undertaken in the various registrars (sic)**” demonstrates a failure on Mr Anstey’s part to understand how classification decisions are to be made, and demonstrates the inadequacy of Mark Anstey’s investigation.

[486] First, the Australian Public Service Classification Guide sets out in clear and unambiguous terms that the work volume of a role does not influence its work value. [406](#)

[487] Second:

The appropriate classification of a job should be determined based on the complexity and responsibility of tasks involved, not the number of tasks or how busy the role is. Work volume may influence the number of employees needed to perform the duties.” [407](#)

[488] Third, the role evaluation principles explicitly provide “[d]o not classify a job on the basis of the workload or how busy it is.” [408](#)

[489] Fourth, according to subsection 13(11) of the *Public Service Act 1999* (Cth), APS employees are, at all times, required to behave in a way that upholds:

- a) the APS Values and APS Employment principles, and
- b) the integrity and good reputation of the employee's agency and the APS.

[490] Fifth, the obligations set out in subsection 13(11) of the *Public Service Act 1999* (Cth) are extended to Agency Heads and Statutory Office Holders under section 14 of the *Public Service Act 1999* (Cth).

[491] Sixth, one of the APS Values pertains to ethics. Subsection 10(2) of the *Public Service Act 1999* (Cth) provides:

The APS demonstrates leadership, is trustworthy, and acts with integrity, in all that it does.

[492] Under s 11 of the *Public Service Act 1999* (Cth), the Australian Public Service Commissioner is empowered to issue directions, in writing, in relation to the APS Values for the purposes of:

- a) ensuring that the APS incorporates and upholds the APS Values; and
- b) determining, where necessary, the scope or application of the APS Values.

[493] Section 14 in the *Australian Public Service Commissioner's Directions 2016* (Cth) (and the revised *Australian Public Service Commissioner's Directions 2022* (Cth)) provides:

Having regard to an individual's duties and responsibilities, upholding the APS Value in subsection 10(2) of the Act requires the following:

...

(e) acting in a way that is right and proper, as well as technically and legally correct or preferable.

[494] Seventh, the guidance contained in the *Australian Public Service Classification Guide* on the fact that the classification of role “should be determined based on the complexity and responsibility of tasks involved, [and] not the number of tasks or how busy the role is” <sup>409</sup> is the product of a lawful exercise of power on the parts of the Australian Public Service Commissioner, and the staff members who assisted the Commissioner to prepare the Guide, to:

a) strengthen the professionalism of the Australian Public Service and facilitate continuous improvement in workforce management; <sup>410</sup>

b) uphold high standards of integrity and conduct in the Australian Public Service; <sup>411</sup> and

c) develop, review and evaluate workforce management policies and practices. <sup>412</sup>

[495] Eighth, no person could reasonably contend that it is ever right and proper, as well as technically and legally correct or preferable, to classify (or reclassify) a role based on “how busy the role is” or, as Kate McMullan put it, “***on the basis of the relative volume ... of work undertaken in the various registrars (sic)***”, because, as the Australian Public Service Classification Guide provides, while “[w]ork volume may influence the number of employees needed to perform the duties”, <sup>413</sup> it has no bearing on the “appropriate classification of a job”, which “should be determined based on the complexity and responsibility of tasks involved, not the number of tasks or how busy the role is.” <sup>414</sup>

[496] Since:

a) all Agency Heads, Statutory Office Holders and APS employees are obligated to act in a way that is right and proper, as well as technically and legally correct or preferable; and

b) the instructions set out in the *Australian Public Service Classification Guide* have been issued by the Australian Public Service Commissioner to officials in agencies, including Agency Heads and their delegates, pursuant to relevant provisions contained in section 41 of the *Public Service Act 1999* (Cth); and

c) the instructions set out in the *Australian Public Service Classification Guide* in respect of the classification or reclassification of a role provide that the classification “should be determined based on the complexity and responsibility of tasks involved, [and] not the number of tasks or how busy the role is”; and

d) the instructions set out in the *Australian Public Service Classification Guide* in respect of the classification or reclassification of a role provide that it is impermissible to “classify a job on the basis of the workload or how busy it is”; and

e) no person could reasonably contend that it is ever right and proper, as well as technically and legally correct or preferable to conduct a role evaluation (including the so-called “role review” of the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in the Western Australia District Registry of the Federal Court) “*on the basis of the relative volume ... of work undertaken in the various registrars (sic)*”,

it follows that Agency Heads, Statutory Office Holders and APS employees have a legal obligation, sourced in the *Public Service Act 1999* (Cth) and elaborated in the *Australian Public Service Commissioner’s Directions 2016* (Cth) (and the revised *Australian Public Service Commissioner’s Directions 2022* (Cth)), to **always** take heed of the instruction in the *Australian Public Service Classification Guide* that provides that while “[w]ork volume may influence the number of employees needed to perform the duties”,<sup>415</sup> it has no bearing on the “appropriate classification of a job”, which “should be determined based on the complexity and responsibility of tasks involved, not the number of tasks or how busy the role is.”<sup>416</sup>

[497] The fact that Kate McMullan satisfied herself that the so-called “role review” of the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in the Western Australia District Registry of the Federal Court was conducted “***on the basis of the relative volume ... of work undertaken in the various registrars (sic)***”, contrary to the Australian Public Service Commissioner’s very instructions demonstrates the patent inadequacy of Kate McMullan’s public interest disclosure investigation.

[498] It also demonstrates the inadequacy of Mark Anstey’s decision because he is perfectly content to allow Kate McMullan to base her finding on a proposition that contradicts the instructions of the Australian Public Service Commissioner, which provide that while “[w]ork volume may influence the number of employees needed to perform the duties”,<sup>417</sup> it has no bearing on the “appropriate classification of a job”, which “should be determined based on the complexity and responsibility of tasks involved, not the number of tasks or how busy the role is.”<sup>418</sup>

[499] As Mr Anstey himself admitted in his decision letter “our investigation of a complaint of this kind focuses on the actions the agency took to investigate and finalise a PID, and whether those actions met the requirements of the PID Act and the Public Interest Disclosure Standard 2013 (PID Standard).” In the light of that concession, how is it that Mr Anstey could be untroubled by the merits of Kate McMullan’s finding that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in the Western Australia District Registry was reclassified “*on the basis of the relative volume ... of work undertaken in the various registrars (sic)*”, when it was never open to Kate McMullan, an acting assistant commissioner in the Australian Public Service Commission, to contradict the instructions of the Australian Public Service Commissioner, which provide that while “[w]ork volume may influence the number of employees needed to perform the duties”,<sup>419</sup> it has no bearing on the “appropriate classification of a job”, which “should be determined based on the complexity and responsibility of tasks involved, not the number of tasks or how busy the role is”, while conducting her public interest disclosure investigation?

[500] The fact that Mr Anstey was unperturbed by Ms McMullan’s finding that a “decision to reclassify these positions was made ***on the basis of the relative volume and complexity of work undertaken in the various registrars (sic)***” demonstrates a failure on Mr Anstey’s part to understand how classification decisions are to be made, and demonstrates the inadequacy of Mark Anstey’s investigation, and demonstrates how Mark Anstey is prepared to exculpate Kate McMullan for conducting a patently inadequate investigation.

## *Ground 7*

[501] Mr Anstey did not address Ms McMullan’s failure to investigate the allegation that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they conspired to deny a candidate, who had been selected for promotion, by a selection committee, to a Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in the Western Australia District Registry of the Federal Court, promotion to the Senior Executive Service of the Australian Public Service so that the scarce Senior Executive Band 1 classification could be allocated to somebody else under **rule 6** of the *Public Service Classification Rules 2000* (Cth). Presumably, this was the case because Mr Anstey was, erroneously, of the view that Ms McMullan was justified in concluding “there was no indication that particular applicants were targeted to have the roles they applied for, and to which they were ultimately appointed, reclassified to be suited to those at EL2 level.”

[502] Ms McMullan’s failure to address the allegation demonstrated the inadequacy of public interest disclosure investigation. It was not appropriate for Mr Anstey to terminate his investigation into Ms McMullan’s failure to address the allegation without providing adequate reasons, especially because I have demonstrated that there is ample evidence indicating that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they conspired to deny a candidate, who had been selected for promotion, by a selection committee, to a Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in the Western Australia District Registry of the Federal Court, promotion to the Senior Executive Service

of the Australian Public Service so that the scarce Senior Executive Band 1 classification could be allocated to somebody else under rule 6 of the *Public Service Classification Rules 2000* (Cth).

### Relief sought

[503] I request that:

a) Mr Anstey's decision to terminate the investigation under the *Ombudsman Act 1976* (Cth) be set aside on the basis of the grounds of review;

b) the Ombudsman make a finding that Kate McMullan's finding that "material provided by FCA also indicates that, following the advertisement of [the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in the Western Australia District Registry] and the finalisation of the recruitment process, a role review was undertaken" was not based on any cogent or probative evidence; [420](#)

c) the Ombudsman make a finding that Kate McMullan's finding that there was "no indication amongst the materials provided that Mr Belcher or Mr Trott were particularly targeted for reclassification of their roles" is, in the light of the evidence, unjustified;

d) the Ombudsman make a finding that Kate McMullan's finding that "[t]he evidence provided does not support a finding that [the reclassification] had occurred to create SESB1 positions for Ms O'Connor [amongst others] ..." is unjustified because, first, there is no evidence that there was a reclassification of the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Western Australia, and, second, because the Senior Executive Band 1 classification that should have been allocated to Mr Trott under rule 6 of the *Public Service Classification Rules 2000* (Cth) was "transferred" to Sydney to be awarded to a person who was chosen to fill a vacancy for a Senior Executive Band 1 National Judicial Registrar role that was never notified in the Public Service Gazette;

e) the Ombudsman make a finding that Kate McMullan failed to comply with procedures established under subsection 15(3) of the *Public Service Act 1999* (Cth) in investigating alleged breaches of the Code of Conduct and had thus failed to comply with paragraph 53(5)(b) of the *Public Interest Disclosure Act 2013* (Cth);

f) the Ombudsman prepare a report of his findings, and refer the matter back to the Australian Public Service Commissioner with a recommendation that the Commissioner reinvestigate the public interest disclosure according to law.

## **5. THE DECISION TO ENGAGE SUSAN O’CONNOR AS A SENIOR EXECUTIVE BAND 1 CLASSIFIED NATIONAL JUDICIAL REGISTRAR**

### Allegation

[504] In essence, I alleged that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they conspired to deny candidates, who had been selected for promotion, by a selection committee, to Senior Executive Band 1 classified National Judicial Registrar & District Registrar roles in the Queensland District Registry and Western Australia District Registry of the Federal Court, promotion to the Senior Executive Service of the Australian Public Service so that the scarce Senior Executive Band 1 classification could be allocated to somebody else under rule 6 of the *Public Service Classification Rules 2000* (Cth), including Susan O’Connor.

### Salient facts

[505] A Senior Executive Band 2 classified Senior National Judicial Registrar vacancy was notified in the Public Service Gazette.<sup>[421](#)</sup>

[506] Among the candidates shortlisted for interview to fill the Senior Executive Band 2 classified Senior National Judicial Registrar vacancy was Susan O’Connor, a principal at Griffith Hack.<sup>[422](#)</sup> Susan O’Connor **only** applied to fill the Senior Executive Band 2 classified Senior National Judicial Registrar vacancy (i.e. did not apply to fill any other registrar vacancies),<sup>[423](#)</sup> and did not apply to fill a Senior Executive Band 1 classified National Judicial Registrar vacancy.<sup>[424](#)</sup>

[507] A selection committee consisting of Sia Lagos, the current Chief Executive Officer and Principal Registrar of the Federal Court, David Pringle, the current Chief Executive Officer and Principal Registrar of Division 1 of the Federal Circuit and Family Court, and Andrea Jarratt, the current Director of National Operations in the Federal Court, selected Paul Farrell as a “recommended candidate” to fill the Senior Executive Band 2 classified Senior National Judicial Registrar & District Registrar vacancy.<sup>[425](#)</sup> Susan O’Connor was unsuccessful in securing the Senior Executive Band 2 classified Senior National Judicial Registrar role.<sup>[426](#)</sup> Despite failing to secure the

Senior Executive Band 2 classified Senior National Judicial Registrar role, a selection committee consisting of Sia Lagos, David Pringle and Andrea Jarratt noted that Susan O'Connor had been "[r]ecommended for a different role in NOR."<sup>427</sup> Sia Lagos, David Pringle and Andrea Jarratt certified reading the selection report and agreeing with the contents of the report.<sup>428</sup> They also certified being "aware of the correct policy and procedures for merit selection and certify that these have been followed".<sup>429</sup>

[508] Sia Lagos, in her capacity as the then Agency Head's delegate, endorsed the decision of the selection committee to select Paul Farrell to fill the Senior Executive Band 2 classified Senior National Judicial Registrar role in the Federal Court.<sup>430</sup>

[509] On 25 October 2018, Kerry Vine-Camp, the then First Assistant Commissioner of the Australian Public Service Commission, was, for the purposes of section 21 of the *Australian Public Service Commissioner's Directions 2016* (Cth), a full participant in the selection process for the Senior Executive Band 2 classified Senior National Judicial Registrar vacancy in the Federal Court, and certified that she had participated in all stages of the selection process, and that the selection process complied with subsection 10A(2) of the *Public Service Act 1999* (Cth) and the *Australian Public Service Commissioner's Directions 2016* (Cth).<sup>431</sup>

[510] On 30 September 2018, Justice Greenwood raised his concerns about Warwick Soden's claims that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Queensland would have to be reclassified in order for the candidate selected by the selection panel to be engaged because the Australian Public Service Commissioner's representative "on the selection panel does not agree with the appointment of Murray Belcher to an SES position."<sup>432</sup>

[511] In correspondence sent to Warwick Soden, Sia Lagos, David Pringle and Darrin Moy on 11 October 2018, Justice Greenwood raised anomalies in claims made by Warwick Soden about the role of the representative of the Australian Public Service Commissioner in respect of a selection process for a Senior Executive Service position. Justice Greenwood noted that the representative of the Australian Public Service Commissioner does not have a power of veto over selection processes for Senior Executive Service roles.<sup>433</sup> Justice Greenwood also noted that the representative's role was to certify that the selection process was conducted properly.<sup>434</sup> Justice Greenwood stated that the steps taken to deny Murray Belcher promotion to the Senior Executive Service of the Australian Public Service could not be based on the misplaced view that the representative of the Australian Public Service Commissioner can veto the selection committee's decision to select Murray Belcher as the "recommended candidate" for promotion to the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in the Queensland District Registry of the Federal Court.<sup>435</sup>

[512] On 12 October 2018, Agency Determination 2018/6 was issued by Warwick Soden.<sup>436</sup> Susan O'Connor's classification for the purposes of rule 6 of the *Public Service Classification Rules 2000* (Cth) is recorded as "SES Band 1".<sup>437</sup>

[513] On 14 October 2018, Justice Greenwood sent an email to Chief Justice Allsop noting:

a) Warwick Soden’s advice that the representative of the Australian Public Service Commissioner has a power of veto over the selection process for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Queensland is inconsistent with the *Public Service Act 1999* and the *Australian Public Service Commissioner’s Directions 2016*; and

b) that neither Warwick Soden nor Sia Lagos actually wanted to promote *Gamma* to the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Queensland because the Senior Executive Band 1 classification had “been taken somewhere else in the organisation.”<sup>438</sup>

Findings and outcomes of Kate McMullan’s investigation under the *Public Interest Disclosure Act 2013* (Cth)

[514] The investigator, Kate McMullan, made several findings.

[515] In response to the allegation that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they conspired to deny Murray Belcher and Russell Trott promotion to the Senior Executive Band 1 classified National Judicial Registrar & District Registrar roles in the Queensland District Registry of the Federal Court and the Western Australian District Registry of the Federal Court so that the scarce Senior Executive Band 1 classifications could be “transferred to Sydney” and allocated to others (including Susan O’Connor) under **rule 6** of the *Public Service Classification Rules 2000* (Cth), Ms McMullan made the following finding:

I found no indication amongst the materials provided that Mr Belcher or Mr Trott were particularly targeted for reclassification of their roles. The evidence provided does not support a finding that this had occurred to create SESB1 positions for Ms O’Connor [amongst others] ...<sup>439</sup>

[516] Moreover, Ms McMullan stated that Ms O’Connor had applied for her role through a gazetted process and was appointed to the Senior Executive Band 1 classified position “following [a] gazetted process.”<sup>440</sup> In respect of the selection process that saw Ms O’Connor selected to fill a Senior Executive Band 1 classified National Judicial Registrar role in the Federal Court in Sydney, Ms McMullan concluded that “[m]aterials provided by the FCA including gazettal information and

selection reports, indicated that this was a process properly undertaken, and the appointment properly made.”<sup>441</sup>

Errors alleged to have been committed by Kate McMullan in complaint lodged with the Office of the Commonwealth Ombudsman on 26 October 2021

[517] Ms McMullan made many errors. A selection of the alleged errors are set out.

[518] First, I challenged Ms McMullan’s findings that:

a) there was “no indication amongst the materials provided that Mr Belcher or Mr Trott were particularly targeted for reclassification of their roles”; and

b) the “evidence provided does not support a finding that [the “reclassifications”] had occurred to create SESB1 positions for Ms O’Connor [amongst others] ...”<sup>442</sup>

[519] I demonstrated how there were many indications amongst the materials provided that Mr Belcher and Mr Trott were particularly targeted for reclassification of their roles, and that the evidence did support a finding that the “reclassifications” had occurred to create SESB1 positions for others, including Ms O’Connor.<sup>443</sup>

[520] Second, among other things, I questioned how Ms McMullan could have come to the conclusion that “[m]aterials provided by the FCA including gazettal information and selection reports, indicated that this was a process properly undertaken, and the appointment properly made” when there was no evidence before Ms McMullan that:

a) the vacancy notification for a Senior Executive Band 1 classified National Judicial Registrar role that Susan O’Connor had been selected to fill had been published in the Public Service Gazette notifying all eligible members of the community about the role;

b) the selection process to fill the Senior Executive Band 1 classified National Judicial Registrar role that Susan O'Connor had been selected to fill was documented; and

c) the selection process to fill the Senior Executive Band 1 classified National Judicial Registrar role that Susan O'Connor had been selected to fill was applied fairly in relation to each eligible candidate. [444](#)

Findings and outcomes of the investigation conducted by Mark Anstey of the Office of the Commonwealth Ombudsman

[521] On 12 December 2022, Mark Anstey, an acting Assistant Director in the Public Interest Disclosure Team of the Ombudsman's Office, terminated an investigation, under the *Ombudsman Act 1976* (Cth), into the errors alleged to have been committed by Ms McMullan. [445](#)

[522] Mr Anstey claimed that the Ombudsman "cannot take any action that would cause an agency to reinvestigate a [public interest disclosure] ... because the [Public Interest Disclosure Act 2013 (Cth)] does not provide a mechanism for a finalised PID investigation to be reopened." [446](#) The falsehood of that legal proposition has been part IV of this email.

[523] Mr Anstey claimed "most of the key findings were not unreasonable for the investigating agency to make." [447](#) That proposition is false, not least for the reasons set out in part XI of this email. Further reasons demonstrating the falsehood of that proposition will be set out below.

[524] Mr Anstey concluded that "there is no practical outcome [the Ombudsman] could obtain by further investigating the complaint", which, as I have demonstrated in part V of this email, is a falsehood, and, on that basis, terminated the investigation into the errors alleged to have been committed by Ms McMullan. [448](#)

[525] In terminating the investigation, Mr Anstey stated: [449](#)

Due to insufficient investigation records having been retained by the Investigating agency we cannot confirm the PID Investigator identified and considered if there had been a failure to advertise in NSW for the SES1 appointment that was subsequently made in NSW. We will provide feedback to the Investigating Agency on this point.

[526] Mr Anstey also stated:[450](#)

In my view, it was reasonably open to the PID Investigator to conclude there was no indication that particular applicants were targeted to have the roles they applied for, and to which they were ultimately appointed, reclassified to be suited to those at EL2 level. I agree with the PID Investigator's conclusion that the primary lesson to learn from this part of the recruitment process was that the agency should have more clearly communicated with staff about the role review process and what led to the decision to classify certain roles at either EL2 or SES level.

#### Grounds of review in respect of the decision to terminate the Ombudsman's investigation

[527] My grounds of review are as follows:

1) Mr Anstey's failure to address the fact that Ms McMullan's investigation was manifestly inadequate given that Ms McMullan had found that "[m]aterials provided by the FCA including gazettal information and selection reports, indicated that [the process to select Ms O'Connor to fill a Senior Executive Band 1 classified National Judicial Registrar role] was a process properly undertaken, and the appointment properly made", even though Mr Anstey conceded that he could not "confirm the PID Investigator identified and considered if there had been a failure to advertise in NSW for the SES1 appointment that was subsequently made in NSW"; and

2) Mr Anstey's failure to address Ms McMullan's failure to investigate the allegation that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they conspired to deny candidates, who had been selected for promotion, by a selection committee, to Senior Executive Band 1 classified National Judicial Registrar & District Registrar roles in the Queensland and Western Australia District Registries of the Federal Court, promotion to the Senior Executive Service of the Australian Public Service so that the scarce Senior Executive Band 1 classification could be allocated to somebody else, including Susan O'Connor, under rule 6 of the *Public Service Classification Rules 2000* (Cth).

#### *Ground 1*

[528] A cardinal allegation in the public interest disclosure allocated to the Australian Public Service Commission by the authorised officer in the Australia Public Service Commission had been that

officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they conspired to deny candidates, who had been selected for promotion, by a selection committee, to Senior Executive Band 1 classified National Judicial Registrar & District Registrar roles in the Queensland District Registry and Western Australia District Registry of the Federal Court, promotion to the Senior Executive Service of the Australian Public Service so that the scarce Senior Executive Band 1 classification could be allocated to somebody else under **rule 6** of the *Public Service Classification Rules 2000* (Cth), including Susan O'Connor, and that the Ms O'Connor had not succeeded in securing the Senior Executive Band 1 classified National Judicial Registrar vacancy she was selected to fill following a merit based selection process for that role (merit based because, a selection process to fill a vacancy meets the requirements of merit-based selection only if a) the vacancy, or a similar vacancy, in the Agency was notified in the Public Service Gazette within a period of 12 months before the written decision to engage the successful applicant;<sup>451</sup> and b) the vacancy was notified as open to all eligible members of the community;<sup>452</sup> and c) the Australian Public Service Commissioner, or his representative, was a full participant in the process and, if a representative of the Commissioner participated in the selection process, the representative certified that the selection process complied with the *Public Service Act 1999* (Cth) and the *Australian Public Service Commissioner's Directions 2016* (Cth)).<sup>453</sup>

[529] In response to a freedom of information request for “access to the ongoing, full-time, SES Band 1 classified National Judicial Registrar vacancy notification, published in the Public Service Gazette, that Susan O'Connor was selected to fill in the course of a merit based selection process”,<sup>454</sup> a decision maker in the Federal Court of Australia refused, pursuant to section 24A of the *Freedom of Information Act 1982* (Cth), to provide access to the document because the document does not exist or cannot be found.<sup>455</sup> It is practically impossible to claim that the document cannot be found because were it published in the Public Service Gazette, which is a publicly accessible document,<sup>456</sup> the decision maker would have been able to source the document from the Gazette. Therefore, the ongoing, full-time, SES Band 1 classified National Judicial Registrar vacancy notification was, contrary to the law,<sup>457</sup> not notified as open to all eligible members of the community.

[530] In response to a freedom on information request for access to “the Australian Public Service Commissioner's representative's certification in relation to the SES Band 1 National Judicial Registrar selection process that saw Susan O'Connor selected as an ongoing, full-time SES Band 1 National Judicial Registrar on 19 November 2018”,<sup>458</sup> National Judicial Registrar & District Registrar Nicola Colbran refused, on internal review, to provide access to the requested document pursuant to section 24A of the *Freedom of Information Act 1982* (Cth) because “the documents cannot be found or do not exist.”<sup>459</sup> Therefore, the Australian Public Service Commissioner's representative was not was a full participant in the process and did not certify that the selection process complied with the *Public Service Act 1999* (Cth) and the *Australian Public Service Commissioner's Directions 2016* (Cth)).

[531] In response to a freedom on information request for access to “the job application for the National Judicial Registrar role that Susan O'Connor was selected to fill”,<sup>460</sup> National Judicial Registrar & District Registrar Nicola Colbran refused, on internal review, to provide access to the requested document pursuant to section 24A of the *Freedom of Information Act 1982* (Cth) because “the documents cannot be found or do not exist.”<sup>461</sup> Therefore, no job application for the National

Judicial Registrar role that Susan O'Connor was selected to fill exists or can be found. That is unsurprising given that:

a) the Senior Executive Band 1 classified National Judicial Registrar role that Susan O'Connor was handed was not notified to the public; and

b) Susan O'Connor only applied to fill a Senior Executive Band 2 classified Senior National Judicial Registrar vacancy.<sup>[462](#)</sup>

[532] In response to a freedom on information request for access to “the vacancy notification for the National Judicial Registrar role that Susan O'Connor ***applied for*** and ***was selected to fill***”, <sup>[463](#)</sup> National Judicial Registrar & District Registrar Nicola Colbran refused, on internal review, to provide access to the requested document pursuant to section 24A of the *Freedom of Information Act 1982* (Cth) because “the documents cannot be found or do not exist.” <sup>[464](#)</sup>

[533] Indeed, in response to a freedom on information request for access to “the selection committee’s selection report in relation to the National Judicial Registrar role that Susan O'Connor applied for and was selected to fill”, <sup>[465](#)</sup> National Judicial Registrar & District Registrar Nicola Colbran refused, on internal review, to provide access to the requested document pursuant to section 24A of the *Freedom of Information Act 1982* (Cth) because “the documents cannot be found or do not exist.” <sup>[466](#)</sup> Therefore, the selection report in relation to the National Judicial Registrar role that Susan O'Connor applied for and was selected to fill does not exist or cannot be found.

[534] It would be impossible to claim that the selection report cannot be found without also conceding that the selection process for the National Judicial Registrar role that Susan O'Connor was selected to fill was not a merit based selection process because, pursuant to paragraph 19(1)(d) of the *Australian Public Service Commissioner’s Directions 2016* (Cth), if a selection process is not appropriately documented, it follows that it does not meet the merit based selection principle set out in paragraph 10(1)(c) of the *Public Service Act 1999* (Cth). Moreover, it is unsurprising that “the selection committee’s selection report in relation to the National Judicial Registrar role that Susan O'Connor applied for and was selected to fill” does not exist given that:

a) the Senior Executive Band 1 classified National Judicial Registrar role that Susan O'Connor was handed was not notified to the public; and

b) Susan O'Connor only applied to fill a Senior Executive Band 2 classified Senior National Judicial Registrar vacancy.<sup>467</sup>

[535] Mr Anstey was prepared to concede that he could not “confirm the PID Investigator identified and considered if there had been a failure to advertise in NSW for the SES1 appointment that was subsequently made in NSW.”

[536] That is a prima facie ground for concluding that the investigation conducted by Ms McMullan was inadequate, particularly because a cardinal allegation made in the internal disclosure was that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they conspired to deny candidates, who had been selected for promotion, by a selection committee, to Senior Executive Band 1 classified National Judicial Registrar & District Registrar roles in the Queensland District Registry and Western Australia District Registry of the Federal Court, promotion to the Senior Executive Service of the Australian Public Service so that the scarce Senior Executive Band 1 classification could be allocated to somebody else under **rule 6** of the *Public Service Classification Rules 2000* (Cth), including Susan O'Connor, and that the Ms O'Connor had not succeeded in securing the Senior Executive Band 1 classified National Judicial Registrar vacancy she was selected to fill following a merit based selection process for that role.

[537] Furthermore, it has been proved, by virtue of concessions made by freedom of information decision makers in the Federal Court of Australia, that there is no documentary evidence of the existence of:

a) the vacancy notification published in the Public Service Gazette for the Senior Executive Band 1 classified National Judicial Registrar vacancy that Susan O'Connor was selected to fill in the course of a merit based selection process; and

b) “the Australian Public Service Commissioner’s representative’s certification in relation to the SES Band 1 National Judicial Registrar selection process that saw Susan O'Connor selected as an ongoing, full-time SES Band 1 National Judicial Registrar on 19 November 2018”; and

c) “the job application for the National Judicial Registrar role that Susan O'Connor was selected to fill”; and

d) “the selection committee’s selection report in relation to the National Judicial Registrar role that Susan O'Connor applied for and was selected to fill”; and

e) “the vacancy notification for the National Judicial Registrar role that Susan O’Connor ***applied for*** and ***was selected to fill***”.

[538] In the light of the concessions made, pursuant to the *Freedom of Information Act 1982* (Cth), by authorised decision makers in the Federal Court of Australia (which includes Nicola Colbran, the most senior Federal Court registrar in South Australia), I question how Mr Anstey did not conclude that Ms McMullan’s investigation was manifestly inadequate given that Ms McMullan had found that “[m]aterials provided by the FCA including gazettal information and selection reports, indicated that [the process to select Ms O’Connor to fill a Senior Executive Band 1 classified National Judicial Registrar role] was a process properly undertaken, and the appointment properly made.”

[539] Plainly, Ms McMullan’s statement that “[m]aterials provided by the FCA including gazettal information and selection reports, indicated that [the process to select Ms O’Connor to fill a Senior Executive Band 1 classified National Judicial Registrar role] was a process properly undertaken, and the appointment properly made” is false. But so far as Mark Anstey was concerned, he would not take issue with the patent falsehood that girded Kate McMullan’s “finding” that “[m]aterials provided by the FCA including gazettal information and selection reports, indicated that [the process to select Ms O’Connor to fill a Senior Executive Band 1 classified National Judicial Registrar role] was a process properly undertaken, and the appointment properly made”.

## *Ground 2*

[540] I challenge Mr Anstey’s claim that “it was reasonably open to the PID Investigator to conclude there was no indication that particular applicants were targeted to have the roles they applied for, and to which they were ultimately appointed, reclassified to be suited to those at EL2 level” because I provided at least five items of documentary evidence to the Office of the Commonwealth Ombudsman, when a complaint was lodged on 26 October 2021, indicating that a Senior Executive Band 1 classification that should have been allocated to each of Mr Belcher and Mr Trott, under rule 6 of the *Public Service Classification Rules 2000* (Cth), was not allocated to them, and that one of the Senior Executive Band 1 classifications was allocated to Susan O’Connor, as alleged.

**(It matters not which of the Senior Executive Band 1 classifications were allocated to Susan O’Connor. Either way, the allegation is made out. For the sake of simplicity, it will be assumed that the Senior Executive Band 1 classification that should have been allocated to Mr Belcher was allocated to Ms O’Connor.)**

[541] The first document is a document titled *Judicial Registrar Recruitment*. [468](#)

[542] The second document is an email from Warwick Soden to Sia Lagos, Catherine Sullivan and Darrin Moy dated 25 September 2018. [469](#)

[543] The third document is an email sent by Justice Greenwood dated 14 October 2018. [470](#)

[544] The fourth document is an email sent by Warwick Soden to Darrin Moy on 15 October 2018. [471](#)

[545] The fifth document is document titled *Judicial Registrar Recruitment – Budget*, [472](#) which was attached to an email sent from Sia Lagos to Catherine Sullivan, Darrin Moy and Andrea Jarratt on 5 October 2018. [473](#)

#### A. *Judicial Registrar Recruitment* document

[546] I draw your attention to the eight page *Judicial Registrar Recruitment* document.

[547] The document commences as follows:

Further to my memorandum of 22 August 2018 regarding the registrar recruitment exercise, this paper provides a further update on the recruitment exercise and recommendations endorsed by the recruitment panel for the appointment of candidates to the Senior National Judicial Registrar (SES2), National Judicial Registrar & District Registrar - VIC, QLD and WA (SES1), Judicial Registrar & District Registrar - TAS (Legal 2) and National Judicial Registrar – Native Title (SES1) positions, subject to your consideration and approval.

[548] I draw your attention to the fact that the National Judicial Registrar & District Registrar roles in the Queensland and Western Australia District Registry of the Federal Court are both recorded as bearing Senior Executive Band 1 classifications according to the author of the document. [474](#)

[549] Among other things, the author of the document sets out, in a table on page 4, Federal Court registrar roles for which recruitment processes had been undertaken, and identifies the candidates selected by the selection committees for the relevant registrar roles in the Federal Court.

[550] One of the roles identified in the table is the “National Judicial Registrar & District Registrar – QLD Registry (SES1).” I draw your attention to the fact that the National Judicial Registrar & District Registrar role is the Queensland District Registry of the Federal Court bears a Senior Executive Band 1 classification.

[551] The names of three lead candidates are set out in the column next to the position, and comments are set out in relation to the lead candidates in a column next to their names. The name of the candidate selected by the selection committee consisting of Sia Lagos, David Pringle and Andrea Jarratt to fill the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role is the Queensland District Registry of the Federal Court is Murray Belcher. <sup>475</sup>Kerryn Vine-Camp, the Australian Public Service Commissioner’s representative for the purposes of the selection process for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy, certified that she had been a full participant in the selection process, and that the selection process complied with subsection 10A(2) of the *Public Service Act 1999* (Cth) and the *Australian Public Service Commissioner’s Directions 2016* (Cth). <sup>476</sup>

[552] In the column next to Mr Belcher’s name is the following typed comment:

Appoint to position subject to Murray’s existing Judicial Registrar (Legal 2) position not backfilled.

Refer to Greenwood J memorandum

[553] Next to the typed comment is a handwritten note – “No SES”.

[554] On the eighth page of the document is a handwritten note, which reads:

Sia

Changes to be managed within 17/18 NOR appropriation. Proposed recruitment approved subject to me seeing & approving reconciliation of costs against budget by Finance Dept (Kat Hunter & Catherine Sullivan).

SES positions WA & QLD not to be filled – positions to be transferred to Sydney – WA & QLD DRs to be filled at Legal 2 with allowance (IFAs) if possible.

[555] The document was signed by Warwick Soden and dated “25/9/18”.

[556] Contrary to Mr Anstey’s claim, it was not reasonably open to the PID Investigator to conclude there was no indication that particular applicants were targeted to have the roles they applied for, and to which they were ultimately appointed, reclassified to be suited to those at EL2 level.

[557] First, it is plain that National Judicial Registrar & District Registrar role in the Queensland District Registry of the Federal Court bears a Senior Executive Band 1 classification.

[558] It was also plain that there had been no re-evaluation of the role such that the role could bear an Executive Level 2 or “Legal 2” classification. That is clear not only because a decision maker in the Federal Court has confirmed that “role evaluation records prepared between 1 January 2017 and 31 December 2020, that show that the SES Band 1 classified National Judicial Registrar & District Registrar role in Queensland was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the Public Service Classification Rules 2000” do not exist.<sup>477</sup> It is clear because Mr Soden refers explicitly to the “SES positions in WA & QLD” in his notes. Had the National Judicial Registrar & District Registrar positions in Western Australia and Queensland been lawfully reclassified to bear Executive Level 2 classifications, then Mr Soden would not have referred to the positions as SES positions.

[559] Second, Mr Soden explicitly states that the “WA & QLD DRs to be filled at Legal 2 with allowance (IFAs) if possible.” “DRs” is an abbreviation for District Registrars, and “IFA” is an abbreviation for *independent flexibility arrangement*, which is an arrangement “enabling an employee and his or her employer to agree on an arrangement varying the effect of the agreement in relation the employee and the employer, in order to meet the genuine needs of the employee and employer.”<sup>478</sup>

[560] An IFA applies between an employer and an employee; it has nothing to do with the allocation of an approved classification, under rule 9 of the *Public Service Classification Rules 2000* (Cth), to each group of duties to be performed in the Federal Court based on the work value of the group of duties described in the work level standards for a particular classification. In other words, consideration of an IFA or its use is of no relevance to the allocation of an approved classification,

under rule 9 of the *Public Service Classification Rules 2000* (Cth), to each group of duties to be performed in any agency.

[561] Given that an IFA applies between an employer and an employee, and the IFA was to be offered to supplement the Legal 2 classification allocated to the “WA & QLD DRs”, the natural conclusion to draw would be that Mr Soden had decided to allocate an Executive Level 2 (i.e. Legal 2) classification to Murray Belcher, upon his “promotion” to the National Judicial Registrar & District Registrar role in Queensland, pursuant to **rule 6** of the *Public Service Classification Rules 2000* (Cth), which requires an Agency Head to “allocate an approved classification to each APS employee in the Agency.”

[562] Mr Soden’s decision was problematic because the classification allocated to Mr Belcher under rule 6 of the *Public Service Classification Rules 2000* (Cth) did not match the classification that had been allocated to the groups of duties associated with the National Judicial Registrar & District Registrar role in Queensland under **rule 9** of the *Public Service Classification Rules 2000* (Cth). The National Judicial Registrar & District Registrar role in Queensland bore, and continues to formally bear, a Senior Executive Band 1 classification and the National Judicial Registrar & District Registrar role in Queensland has never been the subject of a role re-evaluation (i.e. role review), by which the National Judicial Registrar & District Registrar role was reclassified to bear an Executive Level 2 (i.e. Legal 2) classification. [479](#)

[563] Third, Mr Soden explicitly states that the SES “positions [are] to be transferred to Sydney.” This could not possibly mean that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar roles in the Queensland and Western Australia District Registries would be transferred to Sydney because a District Registrar is, by law, required to be located in the District Registry of the relevant State. [480](#) Rather, and as is the case, the National Judicial Registrar & District Registrar of Queensland is based in the Queensland District Registry, and the classification that would have been allocated to him under **rule 6** of the *Public Service Classification Rules 2000* (Cth) was allocated to a person based in Sydney.

[564] Since:

a) there was no evidence before Ms McMullan that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Queensland had been the subject of a role re-evaluation (i.e. a role review) such that the groups of duties to be performed by the National Judicial Registrar & District Registrar in Queensland should have, on the evidence and in the light of the Commissioner’s work level standards, been allocated an Executive Level 2 classification; and

b) a decision maker in the Federal Court has explicitly acknowledged that role evaluation records showing that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Queensland was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, ever reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the *Public Service Classification Rules 2000* do not exist;<sup>481</sup> and

c) Warwick Soden decided to allocate an Executive Level 2 classification to Murray Belcher on 25 September 2018 and, on 31 October 2018 did, in fact, allocate an Executive Level 2 classification to Murray Belcher under *Agency Determination 2018/8*,<sup>482</sup> even though the National Judicial Registrar & District Registrar role in Queensland bore, and continued to bear, a Senior Executive Band 1 classification; and

d) Warwick Soden explicitly stated that the SES “positions [are] to be transferred to Sydney”,<sup>483</sup> where, as would become apparent, there were proposals to allocate two Senior Executive Band 1 classifications to individuals who did not apply for the roles they were offered because those roles were not notified to the public according to law,

it was not, as Mr Anstey claimed, “reasonably open to the PID Investigator to conclude there was **no indication** that particular applicants were targeted to have the roles they applied for, and to which they were ultimately appointed, reclassified to be suited to those at EL2 level.”

B. Email from Warwick Soden to Sia Lagos, Catherine Sullivan and Darrin Moy dated 25 September 2018

[565] I draw your attention to the substance of an email that Warwick Soden sent to Sia Lagos, Catherine Sullivan and Darrin Moy on 25 September 2018,<sup>484</sup> the same day that he set out his notations on the *Judicial Registrar Recruitment* document.

[566] The emails reads as follows:<sup>485</sup>

My reference in my hand written comments on the document discussed with Sia a copy of which I gave to Darrin referred to 17/18 budget. It should have been the approved 18/19 budget. No confusion or “mischief” intended.

[567] I question how Mr Anstey could have concluded that it was “reasonably open to the PID Investigator to conclude there was **no indication** that particular applicants were targeted to have the roles they applied for, and to which they were ultimately appointed, reclassified to be suited to those at EL2 level” when Mr Soden had, impishly, claimed that there was no mischief intended in allocating an Executive Level 2 classification to Murray Belcher, even though the role he had been selected for promotion to was classified, and remained classified, at the Senior Executive Band 1 classification level, and where it was clear that the Senior Executive Band 1 classification that should have been allocated to Mr Belcher under rule 6 of the *Public Service Classification Rules 2000* (Cth) had been “transferred to Sydney”.

C. Email from Justice Greenwood dated 14 October 2018

[568] I draw your attention to the substance of an email that Justice Greenwood sent on 14 October 2018, in which the Judge noted: [486](#)

Two things should be noted. First, Warwick’s advice that the APSC has a veto on an appointment is wrong. It is inconsistent with the [Public Service] Act 1999 and the APS Guidelines 2016. Second, the true position is that neither Warwick nor Sia wanted to appoint MB [Murray Belcher]. The so-called “veto” is a red herring (obfuscation would be a better word) to prevent Murray being awarded the position. The SES classification, you will find, will have been taken somewhere else in the organisation.

[569] Since a Federal Court Judge had observed that the SES classification that should have been allocated to Murray Belcher had been “taken somewhere else in the organisation” it was not “reasonably open to the PID Investigator to conclude there was **no indication** that particular applicants were targeted to have the roles they applied for, and to which they were ultimately appointed, reclassified to be suited to those at EL2 level.” On the contrary, it was patently unreasonable to dismiss Justice Greenwood’s observation. Mr Anstey might as well have said that Justice Greenwood’s observation was worthless because, in his view, it was open to Ms McMullan to conclude that Justice Greenwood’s observation amounted to “**no indication** that particular applicants were targeted to have the roles they applied for, and to which they were ultimately appointed, reclassified to be suited to those at EL2 level.”

D. Email from Warwick Soden to Darrin Moy dated 15 October 2018

[570] I draw your attention to an email that Warwick Soden had forwarded to Darrin Moy, which contained Justice Greenwood’s email of 14 October 2018 in the email chain. The email reads as follows: [487](#)

Darrin

Any suggestions? This is keeping me awake!!!!!!!

Have the 2 people to be appointed in Sydney been given offers for the ses positions? Have they accepted? Would the APSC agree to give us 2 new SES positions? Hold firm? Does Sia have suggestions?

Warwick

[571] Given that I had alleged that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they conspired to deny a candidate, who had been selected for promotion, by a selection committee, to a Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in the Queensland District Registry of the Federal Court, promotion to the Senior Executive Service of the Australian Public Service so that the scarce Senior Executive Band 1 classification could be allocated to somebody else under rule 6 of the *Public Service Classification Rules 2000* (Cth), I question how Mr Anstey could have concluded that it was “reasonably open to the PID Investigator to conclude there was ***no indication*** that particular applicants were targeted to have the roles they applied for, and to which they were ultimately appointed, reclassified to be suited to those at EL2 level”, particularly when:

a) it was apparent that Warwick Soden explicitly acknowledged that two people in Sydney were to be appointed to SES positions, [488](#) even though there was no evidence that the two SES positions in Sydney had been notified to the public; and

b) Warwick Soden had explicitly noted that “SES positions WA & QLD not to be filled – positions to be transferred to Sydney – WA & QLD DRs to be filled at Legal 2 with allowance (IFAs) if possible”; [489](#) and

c) Mr Soden had allocated an Executive Level 2 classification to Mr Belcher, under ***rule 6*** of the *Public Service Classification Rules 2000* (Cth), [490](#) which did not match the Senior Executive Band 1 classification that had been allocated to the groups of duties associated with the National Judicial Registrar & District Registrar role in Queensland under ***rule 9*** of the *Public Service Classification Rules 2000* (Cth); [491](#) and

d) a decision maker in the Federal Court of Australia has, in response to a freedom of information request for access to “[t]he role evaluation records prepared between 1 January 2017 and 31

December 2020, that show that the SES Band 1 classified National Judicial Registrar & District Registrar role in Queensland was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the Public Service Classification Rules 2000”, [492](#) confirmed that the role evaluation records do not exist. [493](#)

*E. Judicial Registrar Recruitment – Budget document*

[572] I draw your attention to page right of the *Judicial Registrar Recruitment* document and, specifically, Mr Soden’s handwritten comments, which read:

Sia

Changes to be managed within 17/18 NOR appropriation. Proposed recruitment approved subject to me seeing & approving reconciliation of costs against budget by Finance Dept (Kat Hunter & Catherine Sullivan) ...

[573] On 5 October 2018, Sia Lagos sent an email to Catherine Sullivan, The Executive Director of Corporate Services in the Federal Court. [494](#) The email was copied to Darrin Moy, the Federal Court’s Executive Director of People, Culture and Communications, and Andrea Jarratt, the Director of National Operations. The email reads:

... I have just had a meeting with Darrin regarding the proposal and proposed remuneration offers and he supports the proposal. I understand that Warwick has requested from you a reconciliation of the resourcing costs in terms of the NOR Budget for 2018/2019.

Can you please review the proposal and advise that the resourcing can be accommodated within the NOR Budget for 2018/2019.

[574] Attached to the email was the *Judicial Registrar Recruitment – Budget* document.

[575] The *Judicial Registrar Recruitment – Budget* document sets out the details of individuals who were “successful candidates” in the registrar recruitment exercise undertaken by the Court.

[576] As expected, Murray Belcher and Russell Trott are, respectively, listed as the successful candidates for the National Judicial Registrar and District Registrar positions in the Queensland and Western Australia District Registries of the Federal Court. Both Mr Belcher and Mr Trott are listed as having been allocated “Legal 2” classifications even though:

a) both Mr Belcher and Mr Trott were selected as “recommended candidates” for Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancies (in Queensland and Western Australia, respectively) by selection committees consisting of Sia Lagos, David Pringle and Andrea Jarratt;<sup>[495](#)</sup> and

b) Sia Lagos endorsed, in her capacity as the Agency Head’s delegate, the decisions to select both Mr Belcher and Mr Trott as “recommended candidates” for Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancies (in Queensland and Western Australia, respectively);<sup>[496](#)</sup> and

c) Kerryn Vine-Camp, the Australian Public Service Commissioner’s representative for the purposes of the Senior Executive Band 1 classified National Judicial Registrar & District Registrar selection processes certified that she had been a full participant in the selection processes, and that the selection processes had complied with subsection 10A(2) of the *Public Service Act 1999* (Cth) and the *Australian Public Service Commissioner’s Directions 2016* (Cth).<sup>[497](#)</sup>

[577] Curiously, two names have been included on the list of successful candidates. The first name is Susan O’Connor and the second is Drew Pearson.

[578] I again draw your attention to the *Judicial Registrar Recruitment* document.<sup>[498](#)</sup>

[579] Among other things, the author of the document sets out, in a table commencing on page 4, Federal Court registrar roles for which recruitment processes had been undertaken, and identifies the candidates selected by the selection committees for the relevant registrar roles in the Federal Court.<sup>[499](#)</sup>

[580] One of the roles identified in the table is the “Senior National Judicial Registrar (SES2).”<sup>[500](#)</sup> The Senior National Judicial Registrar role bears a Senior Executive Band 2 classification.<sup>[501](#)</sup>

[581] The names of three candidates are set out in the column next to the position, and comments are set out in relation to the lead candidates in a column next to their names. [502](#) The name of the candidate selected by the selection committee consisting of Sia Lagos, David Pringle and Andrea Jarratt to fill the Senior Executive Band 2 classified Senior National Judicial Registrar role is Paul Farrell. [503](#) The names of candidates who were unsuccessful are also listed. Among the unsuccessful candidates were Susan O'Connor, "Principal of Griffith Hack Lawyers since 2014", and Drew Pearson, "Partner at Herbert Smith Freehills since 2013". [504](#) Both are listed as being based in Sydney. [505](#)

[582] In the column next to Ms O'Connor's name is the following typed comment: [506](#)

Appoint to a new Judicial Registrar – Legal 2 position (Syd). Would require allowance equivalent to SES1 or higher. Additional cost unless resource allocation scenario is applied (see section below).

[583] Next to the typed comments is a handwritten note, which reads "IFA OK (Funds)." [507](#)

[584] In the column next to Ms Pearson's name is the following typed comment: [508](#)

Appoint to a new Judicial Registrar – Legal 2 position (Syd). Would require allowance equivalent to SES1 or higher. Additional cost unless resource allocation scenario is applied (see section below).

[585] Next to the typed comments is a handwritten note, which reads "IFA OK (Funds)." [509](#)

[X] It is apparent that, despite not securing the Senior Executive Band 2 classified Senior National Judicial Registrar role they applied for, Ms O'Connor and Mr Pearson were to be offered "Legal 2" positions in Sydney, each with an "allowance equivalent to SES1 or higher." [510](#) It is also clear that the mechanism to be used to secure this higher allowances would be an individual flexibility arrangement, which, according to clause 4.1 of the *Federal Court of Australia Enterprise Agreement 2018-2021* [2018] FWCA 4493, does not apply to Senior Executive Service employees. [511](#)

[586] Yet, almost magically, according to *Judicial Registrar Recruitment – Budget* document, Susan O'Connor and Drew Pearson were the "successful candidates" for Senior Executive Band 1 classified National Judicial Registrar vacancies in Sydney. [512](#)

[587] It is, at this point, worth remembering what was noted in paragraphs [528] – [539] set out above. You will recall that, by virtue of concessions made by freedom of information decision makers in the Federal Court of Australia, it has been proved that there is no documentary evidence of the existence of:

a) the vacancy notification published in the Public Service Gazette for the Senior Executive Band 1 classified National Judicial Registrar vacancy that Susan O'Connor was selected to fill in the course of a merit based selection process; and

b) "the Australian Public Service Commissioner's representative's certification in relation to the SES Band 1 National Judicial Registrar selection process that saw Susan O'Connor selected as an ongoing, full-time SES Band 1 National Judicial Registrar on 19 November 2018"; and

c) "the job application for the National Judicial Registrar role that Susan O'Connor was selected to fill"; and

d) "the selection committee's selection report in relation to the National Judicial Registrar role that Susan O'Connor applied for and was selected to fill"; and

e) "the vacancy notification for the National Judicial Registrar role that Susan O'Connor ***applied for*** and ***was selected to fill***".

[588] According to the *Judicial Registrar Recruitment – Budget* document, Susan O'Connor appears to have accepted the Senior Executive Band 1 classified National Judicial Registrar role in Sydney, while Drew Pearson appears to have declined the offer for the Senior Executive Band 1 classified National Judicial Registrar role in Sydney.

[589] Nonetheless:

a) despite the fact that in response to a freedom of information request for access to "[t]he role evaluation records prepared between 1 January 2017 and 31 December 2020, that show that the SES

Band 1 classified National Judicial Registrar & District Registrar role in Queensland was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the Public Service Classification Rules 2000”,<sup>513</sup> an authorised officer in the Federal Court of Australia confirmed that the role evaluation records do not exist; <sup>514</sup> and

b) despite the fact that Warwick Soden noted “SES positions WA & QLD not to be filled – positions to be transferred to Sydney – WA & QLD DRs to be filled at Legal 2 with allowance (IFAs) if possible”;<sup>515</sup>

c) despite the fact that, had the Senior Executive Band 1 classified National Judicial Registrar and District Registrar roles in the Queensland and Western Australia District Registries actually been subjected to role reviews and been reclassified to bear Executive Level 2 classification, Mr Soden would not have had any cause to refer to the transfer of “SES positions in WA & QLD” to Sydney; and

d) despite the fact that an independent flexibility arrangement cannot be allocated to a group of duties under rule 9 of the *Public Service Classification Rules 2000* (Cth), and can only be entered into with a natural person and, in this instance, was to be used to supplement the classification allocated to Mr Belcher under rule 6 of the *Public Service Classification Rules 2000* (Cth); and

e) despite the fact that there was no evidence before Ms McMullan that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Queensland had been the subject of a role re-evaluation (i.e. a role review) such that the groups of duties to be performed by the National Judicial Registrar & District Registrar in Queensland should, on the evidence and in the light of the Commissioner’s work level standards, be allocated an Executive Level 2 classification; and

f) despite the fact that Mr Soden had, impishly, claimed that there was no mischief intended in allocating an Executive Level 2 classification to Murray Belcher, even though the role he had been selected for promotion to was classified, and remained classified, at the Senior Executive Band 1 classification level; and

g) despite the fact that Justice Greenwood had, in an email dated 14 October 2018, explicitly observed, in relation to the classification to be allocated to Murray Belcher under rule 6 of the *Public Service Classification Rules 2000* (Cth), that the “SES classification, you will find, will have been taken somewhere else in the organisation”; and

h) despite the fact that Justice Greenwood had, in an email dated 14 October 2018, explicitly noted that “Warwick’s advice that the APSC has a veto on an appointment is wrong” and that the advice “is inconsistent with the [Public Service] Act 1999 and the APS Guidelines 2016”; and

i) despite the fact that Justice Greenwood had, in an email dated 14 October 2018, explicitly noted that the “advice” provided to Justice Greenwood about the Australian Public Service Commissioner’s representative powers of “veto” over the selection process were proffered to obfuscate “the true position”, which was “that neither Warwick nor Sia wanted to appoint [Murray Belcher]”;

j) despite the fact that Murray Belcher was selected by a selection committee consisting of Sia Lagos, David Pringle and Andrea Jarratt, for promotion to the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Queensland, and despite the fact that Sia Lagos endorsed, as the Agency Head’s delegate, the selection committee’s decision to promote Murray Belcher to the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Queensland, and despite the fact that, on 25 October 2018, Kerryn Vine-Camp certified that she had been a full participant in the selection process for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Queensland and that the process complied with subsection 10A(2) of the *Public Service Act 1999* (Cth) and the *Australian Public Service Commissioner’s Directions 2016* (Cth), in the *Judicial Registrar Recruitment – Budget* document, which was sent by Sia Lagos to Catherine Sullivan, among others, on 5 October 2018, Murray Belcher is listed as the “successful candidate” for a “Legal 2” classified National Judicial Registrar & District Registrar role in Queensland, even though the Federal Court has explicitly acknowledged that no record of role evaluation documents, which were prepared between 1 January 2017 and 31 December 2020, showing that the SES Band 1 classified National Judicial Registrar & District Registrar role in Queensland was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the Public Service Classification Rules 2000 exists; and

k) despite the fact that Susan O’Connor and Drew Pearson had both not secured the Senior Executive Band 2 classified Senior National Judicial Registrar role, and despite the fact that Susan O’Connor and Drew Pearson were to, as consolation, be offered “Legal 2” Judicial Registrar roles in Sydney, both Susan O’Connor and Drew Pearson were, in the *Judicial Registrar Recruitment – Budget* document prepared by Sia Lagos, listed as being the “successful candidates” for Senior Executive Band 1 classified National Judicial Registrar roles based in Sydney; and

l) despite the fact that an official in the Federal Court has acknowledged that the “SES Band 1 classified National Judicial Registrar vacancy notification, published in the Public Service Gazette, that Susan O’Connor was selected to fill in the course of a merit based selection process ...” does not exist;<sup>516</sup> and

m) despite the fact that an official in the Federal Court has acknowledged that “the Australian Public Service Commissioner’s representative’s certification in relation to the SES Band 1 National Judicial Registrar selection process that saw Susan O’Connor selected as an ongoing, full-time SES Band 1 National Judicial Registrar on 19 November 2018” [517](#) does not exist or cannot be found; [518](#) and

n) despite the fact that an official in the Federal Court has acknowledged that “the job application for the National Judicial Registrar role that Susan O’Connor was selected to fill” [519](#) does not exist or cannot be found; [520](#) and

o) despite the fact that an official in the Federal Court has acknowledged that “the selection committee’s selection report in relation to the National Judicial Registrar role that Susan O’Connor applied for and was selected to fill” [521](#) does not exist or cannot be found; [522](#) and

p) despite the fact that an official in the Federal Court has acknowledged that “the vacancy notification for the National Judicial Registrar role that Susan O’Connor ***applied for*** and ***was selected to fill***” [523](#) does not exist or cannot be found; [524](#) and

m) despite the fact that Mr Soden, in an email sent on 15 October 2018, confessed to “transfer” of the “SES positions WA & QLD” to Sydney keeping him awake at night, [525](#)

Mr Anstey’s view is that “it was reasonably open to the PID Investigator to conclude there was ***no indication*** that particular applicants were targeted to have the roles they applied for, and to which they were ultimately appointed, reclassified to be suited to those at EL2 level.” ***No indication*** that applicants were targeted to have the roles they applied for, and to which they were ultimately appointed, reclassified to be suited to those at EL2 level? **Only if you are a mandarin with the acuity of a kumquat.**

[590] Plainly, Mr Anstey’s view that “it was reasonably open to the PID Investigator to conclude there was ***no indication*** that particular applicants were targeted to have the roles they applied for, and to which they were ultimately appointed, reclassified to be suited to those at EL2 level” is unjustifiable because, for the reasons set out above, there is ample evidence indicating “that particular applicants were targeted to have the roles they applied for, and to which they were ultimately appointed, reclassified to be suited to those at EL2 level.”

[591] More to the point, there is ample evidence indicating that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they conspired to deny a candidate, who had been selected for promotion, by a selection committee, to a Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in the Queensland District Registry of the Federal Court, promotion to the Senior Executive Service of the

Australian Public Service so that the scarce Senior Executive Band 1 classification could be allocated to somebody else (either Susan O'Connor or Drew Pearson) under rule 6 of the *Public Service Classification Rules 2000* (Cth).

### Relief sought

[592] I request that:

a) Mr Anstey's decision to terminate the investigation under the *Ombudsman Act 1976* (Cth) be set aside on the basis of the grounds of review;

b) the Ombudsman make a finding that Kate McMullan's finding that there was "no indication amongst the materials provided that Mr Belcher or Mr Trott were particularly targeted for reclassification of their roles" is, in the light of the evidence, unjustified;

c) the Ombudsman make a finding that Kate McMullan's finding that "[t]he evidence provided does not support a finding that [the reclassification] had occurred to create SESB1 positions for Ms O'Connor [amongst others] ..." is unjustified because, first, there is no evidence that there was a reclassification of the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Queensland, and, second, because the Senior Executive Band 1 classification that should have been allocated to Mr Belcher under rule 6 of the *Public Service Classification Rules 2000* (Cth) was "transferred" to Sydney and awarded to Susan O'Connor, who was chosen to fill a vacancy for a Senior Executive Band 1 National Judicial Registrar role that was never notified in the Public Service Gazette;

d) the Ombudsman make a finding that Kate McMullan's finding that "[m]aterials provided by the FCA including gazettal information and selection reports, indicated that [the process to select Ms O'Connor to fill a Senior Executive Band 1 classified National Judicial Registrar role] was a process properly undertaken, and the appointment properly made" is false;

e) the Ombudsman make a finding that the selection process by which Susan O'Connor was selected to fill a Senior Executive Band 1 National Judicial Registrar position was not a merit based selection process because the selection process did not comply with the requirements set out in Part 3, Division 1, Subdivision B of the *Australian Public Service Commissioner's Directions 2016* (Cth);

f) the Ombudsman make a finding that Kate McMullan failed to comply with procedures established under subsection 15(3) of the *Public Service Act 1999* (Cth) in investigating alleged breaches of the Code of Conduct and had thus failed to comply with paragraph 53(5)(b) of the *Public Interest Disclosure Act 2013* (Cth);

g) the Ombudsman prepare a report of his findings, and refer the matter back to the Australian Public Service Commissioner with a recommendation that the Commissioner reinvestigate the public interest disclosure according to law.

## **6. THE DECISION TO ENGAGE CLAIRE GITSHAM AS A NATIONAL JUDICIAL REGISTRAR**

### Allegation

[593] In essence, I alleged that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they engaged Claire Gitsham to fill an Executive Level 2 role for which there had been no role evaluation, and for which there was no merit based selection process.

### Salient facts

[594] Claire Gitsham **only** applied to fill the Senior Executive Band 2 classified Senior National Judicial Registrar role and the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in the Victoria District Registry of the Federal Court of Australia. [526](#) Claire Gitsham did not apply for the National Judicial Registrar role that she was handed. [527](#)

[595] The Senior Executive Service Band 1 classified National Judicial Registrar & District Registrar vacancy in the Victoria District Registry of the Federal Court was notified in the Public Service Gazette. [528](#)

[596] According to the selection report for the Senior Executive Service Band 1 classified National Judicial Registrar & District Registrar vacancy in the Victoria District Registry of the Federal Court, six candidates were shortlisted for interview. [529](#)

[597] Among the candidates shortlisted for interview to fill the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy was Claire Gitsham, a partner at Thomson Geer.<sup>530</sup>

[598] A selection committee consisting of Sia Lagos, the current Chief Executive Officer and Principal Registrar of the Federal Court, David Pringle, the current Chief Executive Officer and Principal Registrar of Division 1 of the Federal Circuit and Family Court, and Andrea Jarratt, the current Director of National Operations in the Federal Court, selected Tim Luxton as the “recommended candidate” for promotion to the Senior Executive Service Band 1 classified National Judicial Registrar & District Registrar vacancy in the Victoria District Registry.<sup>531</sup> Claire Gitsham was unsuccessful in securing the Senior Executive Service Band 1 classified National Judicial Registrar & District Registrar role in the Victoria District Registry.<sup>532</sup> Despite failing to secure the Senior Executive Service Band 1 classified National Judicial Registrar & District Registrar role in the Victoria District Registry, a selection committee consisting of Sia Lagos, David Pringle and Andrea Jarratt noted that Claire Gitsham had been “[r]ecommended for a different role in the NOR team.”<sup>533</sup>

[599] Sia Lagos, David Pringle and Andrea Jarratt certified reading the selection report and agreeing with the contents of the report.<sup>534</sup> They also certified being “aware of the correct policy and procedures for merit selection and certify that these have been followed”.<sup>535</sup>

[600] Sia Lagos, in her capacity as the then Agency Head’s delegate, endorsed the decision of the selection committee to select Tim Luxton for promotion to the Senior Executive Service Band 1 classified National Judicial Registrar & District Registrar vacancy in the Victoria District Registry of the Federal Court.<sup>536</sup>

[601] On 25 October 2018, Kerryn Vine-Camp, the then First Assistant Commissioner of the Australian Public Service Commission, certified that she was, for the purposes of section 21 of the *Australian Public Service Commissioner’s Directions 2016* (Cth), a full participant in the selection process for the Senior Executive Service Band 1 classified National Judicial Registrar & District Registrar vacancy in the Victoria District Registry, and certified that she had participated in all stages of the selection process, and that the selection process complied with subsection 10A(2) of the *Public Service Act 1999* (Cth) and the *Australian Public Service Commissioner’s Directions 2016* (Cth).<sup>537</sup>

[602] On 12 October 2018, Claire Gitsham was offered a contract of employment to fill an Executive Level 2 National Judicial Registrar role in the Victoria District Registry of the Court, on an ongoing, full-time basis.<sup>538</sup> The contract of employment was supplemented with an individual flexibility arrangement such that Claire Gitsham’s base salary would be increased by some \$60,000 above the rate of pay ordinarily available to Executive Level 2 legal staff under the terms of the *Federal Court of Australia Enterprise Agreement 2018-2021* [2018] FWCA 4493.<sup>539</sup> Claire Gitsham’s rate of pay

was also more than \$22,500 higher than the rate of pay awarded to Tim Luxton, the person who was selected for promotion to fill the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in the Victoria District Registry. <sup>540</sup> On 15 October 2018, Claire Gitsham accepted the terms of the contract of employment provided to her to fill an Executive Level 2 National Judicial Registrar role in the Victoria District Registry of the Court, on an ongoing, full-time basis. <sup>541</sup>

Findings and outcomes of Kate McMullan's investigation under the *Public Interest Disclosure Act 2013* (Cth)

[603] The investigator, Kate McMullan, made several findings.

[604] In response to the allegation that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they engaged Claire Gitsham to fill an Executive Level 2 role for which there had been no role evaluation, and for which there was no merit based selection process, Ms McMullan made the following finding:

I found no indication amongst the materials provided that Mr Belcher or Mr Trott were particularly targeted for reclassification of their roles ...

The material provided by FCA does indicate that Mr Belcher and Mr Trott applied for SESB1 positions and were ultimately placed into Legal 2 positions. However material provided by FCA also indicates that, following the advertisement of these positions and the finalisation of the recruitment process, a role review was undertaken ... The evidence provided indicates that as a result of a role review, a determination was made that NJR positions could be held at the SESB1 level in some registrars, and at the Legal 2 level in other registrars ... On the basis of the evidence and on the balance of probabilities, I find that this allegation is not substantiated. <sup>542</sup>

[605] Moreover, Ms McMullan stated that Ms Gitsham had applied for her role through a gazetted process and was appointed to the Executive Level 2 National Judicial Registrar position “following [a] gazetted process.” <sup>543</sup> In respect of the selection process that saw Ms Gitsham selected to fill an Executive Level 2 National Judicial Registrar position in the Victoria District Registry of the Federal Court, Ms McMullan concluded that “Ms Gitsham and Mr Benter were applicants in process NN10725159 and were offered, and accepted, Legal 2 positions following the role review activity referenced above.” <sup>544</sup>

Errors alleged to have been committed by Kate McMullan in complaint lodged with the Office of the Commonwealth Ombudsman on 26 October 2021

[606] Ms McMullan made many errors but there were two fundamental errors, and a derivative error.

[607] First, there were problems with Ms McMullan's finding that "following the advertisement of [the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – QLD and the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – WA] positions and the finalisation of the recruitment process, a role review was undertaken." [545](#)

[608] Specifically, in order for Ms McMullan's finding to be correct, it must be the case that a role review of a Senior Executive Band 1 classified National Judicial Registrar role, as distinct to the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – QLD role and the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – WA role, [546](#) was undertaken. [547](#) There was no evidence before Ms McMullan demonstrating that a role review had taken place such that the groups of duties associated with the National Judicial Registrar role had been allocated an Executive Level 2 classification. [548](#)

[609] Second, in order for Claire Gitsham to have been lawfully engaged to fill an Executive Level 2 National Judicial Registrar role in the Victoria District Registry of the Federal Court on an ongoing, full-time basis, and in order for Kate McMullan to have concluded that Claire Gitsham was selected according to a merit based selection process, it was, among other things, necessary: [549](#)

a) for the vacancy, or a similar vacancy, in the Federal Court of Australia to be notified in the Public Service Gazette within a period of 12 months before the written decision to engage Ms Gitsham; [550](#) and

b) for the vacancy to have been notified as open to all eligible members of the community; [551](#) and

c) for the aim and purpose of the selection process for the Executive Level 2 National Judicial Registrar role in the Victoria District Registry of the Federal Court to have been determined in advance; [552](#) and

d) for information about the selection process for the Executive Level 2 National Judicial Registrar role in the Victoria District Registry of the Federal Court to have been readily available to applicants;<sup>553</sup> and

e) for the selection process for the Executive Level 2 National Judicial Registrar role in the Victoria District Registry of the Federal Court to be appropriately documented. <sup>554</sup>

[610] Aside from the fact that there was no evidence before Ms McMullan that a role evaluation had been conducted for a National Judicial Registrar role which had been allocated an Executive Level 2 classification, there was no evidence before Ms McMullan that, among other things: <sup>555</sup>

a) an Executive Level 2 classified National Judicial Registrar vacancy had been notified in the Public Service Gazette and, as a consequence, that the vacancy was notified as open to all eligible members of the community;

b) any applications were received for an Executive Level 2 classified National Judicial Registrar vacancy that Ms Gitsham was engaged to fill; and

c) the aim and purpose of the selection process for the Executive Level 2 National Judicial Registrar role in the Victoria District Registry of the Federal Court had been determined in advance.

[611] That Ms McMullan found that the allegations that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they engaged Claire Gitsham to fill an Executive Level 2 role for which there had been no role evaluation, and for which there was no merit based selection process, were “on the basis of the evidence and on the balance of probabilities ... not substantiated” even though there was no evidence before Ms McMullan that:

a) a role review had taken place such that the National Judicial Registrar role had been allocated an Executive Level 2 classification for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth); and

b) Claire Gitsham was selected to fill a National Judicial Registrar role bearing an Executive Level 2 classification in the course of a merit-based selection process,

demonstrated that Ms McMullan had failed, as part of her public interest disclosure investigation, to ascertain whether Claire Gitsham had been engaged according to law and that, accordingly, Ms McMullan's finding that "on the basis of the evidence and on the balance of probabilities, I find that this allegation is not substantiated" was made on something other than logically probative and relevant evidence.<sup>556</sup>

[612] Third, being the derivative error, Ms McMullan's conclusion that the National Judicial Registrar could bear both an Executive Level 2 and Senior Executive Band 1 classification on no basis other than the relative work load and complexity of the work undertaken would mean that Ms McMullan was suggesting that a **constructive** broadbanding arrangement across a Senior Executive Band classification were permissible, even though it is explicitly prohibited under rule 9(5) of the *Public Service Classification Rules 2000* (Cth).<sup>557</sup>

#### Findings and outcomes of the investigation conducted by Mark Anstey of the Office of the Commonwealth Ombudsman

[613] On 12 December 2022, Mark Anstey, an acting Assistant Director in the Public Interest Disclosure Team of the Ombudsman's Office, terminated an investigation, under the *Ombudsman Act 1976* (Cth), into the errors alleged to have been committed by Ms McMullan on two broad grounds.<sup>558</sup>

[614] Mr Anstey claimed that the Ombudsman "cannot take any action that would cause an agency to reinvestigate a [public interest disclosure] ... because the [Public Interest Disclosure Act 2013 (Cth)] does not provide a mechanism for a finalised PID investigation to be reopened."<sup>559</sup> The falsehood of that legal proposition has been part IV of this email.

[615] Mr Anstey claimed "most of the key findings were not unreasonable for the investigating agency to make."<sup>560</sup> That proposition is false, not least for the reasons set out in part XI of this email. Further reasons demonstrating the falsehood of that proposition will be set out below.

[616] Mr Anstey concluded that "there is no practical outcome [the Ombudsman] could obtain by further investigating the complaint", which, as I have demonstrated in part V of this email, is a falsehood, and, on that basis, terminated the investigation into the errors alleged to have been committed by Ms McMullan.<sup>561</sup>

[617] In terminating the investigation, Mr Anstey stated: [562](#)

I understand your view that there was not a properly documented review of roles and classifications that would allow an Agency Head to appoint individuals to the relevant position at SES1 or EL2 level.

Conducting and documenting a role review is not set down in legislation. The APS Classification Guide recommends a role review or role evaluation be carried out in certain circumstances, including reviews conducted because of a restructure or reorganisation within an agency. That said, ultimately it is at the discretion of the Agency Head to determine the duties of an employee and determine an appropriate classification based on those duties.

The PID Investigator concluded the material available indicated there had been a role review and the decision to reclassify these positions was made “*on the basis of the relative volume and complexity of work undertaken in the various registrars (sic)*”. I accept that you dispute this. I also appreciate the reasons for the decision could have been better communicated to agency staff, as the PID Investigator noted, and similarly the internal records could have been more detailed. It nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented.

[618] Mr Anstey also stated: [563](#)

I note your view the PID Investigator failed to address a key legal issue at the start of the investigation – this being the holding of a role at SES1 and EL2 classifications. As I understand it, you were concerned the implication of the PID investigation report was that “*it is acceptable for broadbanding arrangements to extend to SES classification*”. As you noted, there is no broadbanding between EL classifications and SES ...

While I acknowledge your views, what happened in this case does not appear to be a case of unlawful broadbanding – this being broadbanding between EL and SES classifications. In your complaint you said the records indicated a “*proposition that the ... role could bear a classification of both Executive Level 2 and SES Band 1*”. In my view, it appears the agency decided the position could have a classification of *either* EL2 or SES, depending on the requirements of the specific role ...

The arrangements the agency put in place for several appointees did not allow individuals appointed to the positions at EL2 level via an individual flexibility arrangement (IFA) to progress to the SES level without the need for an open, competitive selection process. As the Investigator noted, a decision was made that “*the NJR positions could be held at the SESB1 level in some registrars (sic), and at the Legal 2 level in other registrars (sic)*” due to an assessment about the differing volume and complexity of work in each registry. This does not appear to be a case of unlawful broadbanding. I accept the report could have provided more

detail about how this alleged issue was assessed. However, the PID Investigator did not fail to identify and consider the issue.

Related to the PID Investigator's alleged failure to properly consider this alleged unlawful broadbanding was your complaint the recruitment process inappropriately sought to avoid a cap that may have been placed on the number of positions to be offered at each level. In my view, when caps are in place – whether at SES or APS level – it is open to an agency to use an IFA to attract or retain talent if this meets a genuine operational need of the agency. Such a practice would not be a case of 'getting around' a cap in the sense of frustrating the underlying purpose of a cap, which is to limit the number of permanent employees at particular level. Unlike the entitlements that attach to permanent appointments to the APS a person's IFA can be terminated at any time, including if it ceases to meet a genuine operational need. This is consistent with the accepted practice that agencies can use labour hire staff to meet genuine operational needs at considerably higher cost than permanent or non-ongoing staff so long as these actions are commensurate with relevant requirements under the *Public Governance, Performance and Accountability Act* (the PGPA Act).

I understand you were also concerned that some individuals who applied for a position at SES level were subsequently appointed to positions at EL2 level. In my view, it was reasonably open to the PID Investigator to not make a finding of disclosable conduct relating to the decision and decision-making process that led to appointing these individuals to positions at EL2 level. This is because it appears that relevant individuals were already employed by the agency at EL2 level. Sections 25 and 26 of the *Public Service Act 1999* and section 46 of the Australian Public Service Commissioner's Directions 2002 allow for a person to be moved 'at level' or to be assigned different duties, i.e. a different role, at level. This provides agencies with the ability to move people into a different role, at level. In my view, it was open to the PID Investigator to not make a finding of disclosable conduct relating to the decision and decision-making process that led to existing substantive EL2 staff being moved 'at level' to a different role at the same EL2 level.

#### Grounds of review in respect of the decision to terminate the Ombudsman's investigation

[619] The complaint in respect of broadbanding had plainly been too subtle for Mr Anstey to follow; Mr Anstey has missed the point. Naturally, "arrangements the agency put in place for several appointees did not allow individuals appointed to the positions at EL2 level via an individual flexibility arrangement (IFA) to progress to the SES level without the need for an open, competitive selection process" because the National Judicial Registrar role had never been allocated an Executive Level 2 classification under **rule 9** of the *Public Service Classification Rules 2000* (Cth). I was not suggesting that an *explicit* broadbanding arrangement had been effected; it would be impossible to effect an explicit broadbanding arrangement where the National Judicial Registrar role had **never** been the subject of a role review, such that an Executive Level 2 classification was allocated to the National Judicial Registrar role pursuant to **rule 9** of the *Public Service Classification Rules 2000* (Cth).

[620] Rather, Ms McMullan’s conclusion that the National Judicial Registrar could bear both an Executive Level 2 and Senior Executive Band 1 classification on no basis other than the relative work load and complexity of the work undertaken would mean that Ms McMullan was suggesting that a **constructive** broadbanding arrangement across a Senior Executive Band classification were permissible, even though it is explicitly prohibited under rule 9(5) of the *Public Service Classification Rules 2000* (Cth). Of course, as has already been noted in part VIII of this review application, work load can never be a ground for allocating a particular classification to a group of duties and, by force of logic, can never be relevant to a broadbanding arrangement.

[621] The complaint about *constructive* broadbanding is ultimately a derivative issue and, as such, will not be pressed in the grounds of review.

[622] The complaint about constructive broadbanding is derivative because it presupposes that the National Judicial Registrar role was the subject of a role re-evaluation (i.e. a role review) such that, following a lawful review, an Executive Level 2 classification was allocated to the National Judicial Registrar role, for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth), on the basis that “*the NJR positions could be held at the SESB1 level in some registrars (sic), and at the Legal 2 level in other registrars (sic)*’ due to an assessment about the differing volume and complexity of work in each registry.”

[623] While it is difficult to prove a negative, I will demonstrate that there never was a role review and, as such, there was no evidentiary basis for finding that “*the NJR positions could be held at the SESB1 level in some registrars (sic), and at the Legal 2 level in other registrars (sic)*’ due to an assessment about the differing volume and complexity of work in each registry.”

[624] My grounds of review are as follows:

1) Mr Anstey’s claim that “[t]he APS Classification Guide *recommends* a role review or role evaluation be carried out in certain circumstances ...” is false;

2) Mr Anstey’s claim that “[c]onducting and documenting a role review is not set down in legislation” is stunted and misinformed because the legal obligation to conduct and document a role review is legislatively mandated;

3) Mr Anstey’s claim that “ultimately it is at the discretion of the Agency Head to determine the duties of an employee and determine an appropriate classification based on those duties” is false;

4) Mr Anstey's claim that "[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented" is unjustifiable;

5) The fact that Mr Anstey was unperturbed by Ms McMullan's finding that a "decision to reclassify these positions was made *on the basis of the relative volume and complexity of work undertaken in the various registrars (sic)*" demonstrates a failure on Mr Anstey's part to understand how classification decisions are to be made;

6) Mr Anstey's claim that "it was reasonably open to the PID Investigator to not make a finding of disclosable conduct relating to the decision and decision-making process that led to appointing these individuals to positions at EL2 level ... because it appears that relevant individuals were already employed by the agency at EL2 level" is false;

7) Mr Anstey's claims about the "SES cap" are, in the light of the evidence, misinformed;

8) Mr Anstey's claim that "[s]ections 25 and 26 of the *Public Service Act 1999* and section 46 of the Australian Public Service Commissioner's Directions 2022 allow for a person to be moved 'at level' or to be assigned different duties, i.e. a different role, at level" is irrelevant and incorrect; and

9) Mr Anstey's failure to address Ms McMullan's failure to investigate the allegation that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they engaged Claire Gitsham to fill an Executive Level 2 role for which there had been no role evaluation, and for which there was no merit based selection process.

[625] I adopt the reasoning in paragraphs [292] – [301].

## *Ground 2*

[626] I adopt the reasoning in paragraphs [312] – [314].

### *Ground 3*

[627] I adopt the reasoning in paragraphs [315] – [318].

### *Ground 4*

[628] Mr Anstey’s claim that “[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented” is unjustifiable.

[629] I repeatedly noted, in the complaint lodged with the Office of the Commonwealth Ombudsman on 26 October 2021, that there was no evidence before Ms McMullan that a role review of the National Judicial Registrar role had ever been conducted, such that the National Judicial Registrar role was allocated an Executive Level 2 classification for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth), and that Ms McMullan’s claims that a role review of the National Judicial Registrar role was not based on any cogent or probative evidence. [564](#)

[630] Acknowledging the challenge of proving a negative, I will demonstrate how Ms McMullan’s claim that a role review of the National Judicial Registrar role had been undertaken, and how Mr Anstey’s claim that “[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented”, were based on the false premise that there is evidence that a role review had been conducted.

[631] While neither Ms McMullan (in contravention of her duties under subsection 51(3) of the *Public Interest Disclosure Act 2013* (Cth) and section 13 of the *Public Interest Disclosure Standard 2013* (Cth)) nor Mr Anstey identified the item of evidence that Mr Anstey claimed was the Agency Head’s documented decision that “it was appropriate and necessary for some positions to be held at EL2 level”, decision makers in the Australian Public Service Commission has provided a publicly accessible clue.

A. The Australian Public Service Commission's claims about documents supporting the finding that "a role review process ... had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load"

[632] In response to a freedom of information request for access to "any and all documents (including but not limited to classification evaluation documents prepared for the 'Legal 2' and 'SES1' classification level registrar positions referred to in an Australian article published on 9 February 2022 titled Federal Court boss warned on job rule sidestep) that support acting assistant commissioner Kate McMullan's conclusion that, in relation to the 'National Judicial Registrar role', 'a role review process ... had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load'", [565](#) Giorgina Strangio, the former Assistant Commissioner – Integrity, Performance and Employment Policy, issued a decision noting that there were two documents that addressed the terms of the freedom of information request –

a) "Email correspondence between Commission and Federal Court of Australia titled 'PRIVATE AND CONFIDENTIAL' dated 27 October 2020"; and

b) "Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia", [566](#)

but refused to grant access to the documents because it was, in her view, contrary to the public interest. [567](#)

B. Assessment of the relevance of the "Email correspondence between Commission and Federal Court of Australia titled 'PRIVATE AND CONFIDENTIAL' dated 27 October 2020" to Mr Anstey's claim that "[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented"

[633] The email correspondence dated 27 October 2020 was an email sent from the then acting Deputy Principal Registrar of the Federal Court to Ms McMullan in response to an email Ms McMullan had sent to Sia Lagos on 20 October 2020.

[634] On 20 October 2020, Ms McMullan sent Sia Lagos an email in which Ms McMullan stated: [568](#)

Appointment of National Judicial Registrars

... Is there a role scope document, or another equivalent document, that outlines that this position can be at either level, and/or clarifies the distinction between an SES Band 1 National Judicial Registrar and an EL2 National Judicial Registrar? Has it been communicated internally to your staff that this role can be at either an SESB1 or EL2 level and, if so, could you please provide me with any relevant communication, e.g. an all-staff email or internal organisation chart that makes this clear?

[635] The acting Deputy Principal Registrar of the Federal Court responded to Ms McMullan's questions on 27 October 2020, stating: [569](#)

There is no specific document that identifies when a National Judicial Registrar position is classified as SES1 or EL2.

[636] The acting Deputy Principal Registrar then continued, noting: [570](#)

The classification is determined by regard to the additional responsibilities that a person within a specific position undertakes, such as leading a specialist national practice area or the fulfilling of a statutory role and leadership responsibilities in a particular location.

[637] The acting Deputy Principal Registrar's statement is ambiguous. It is not clear if the acting Deputy Principal Registrar is stating that the classification "determined by regard to the additional responsibilities that a person within a specific position undertakes" is the classification allocated to the groups of duties for the relevant role, based on the work value of the group of duties **described in the work level standards for that classification**, under **rule 9** of the *Public Service Classification Rules 2000* (Cth), or if the acting Deputy Principal Registrar is stating that the classification "determined by regard to the additional responsibilities that a person within a specific position undertakes" is the classification allocated to an APS employee under **rule 6** of the *Public Service Classification Rules 2000* (Cth). In the light of the evidence, it will become undeniably evident that the latter is the sense in which the acting Deputy Principal Registrar's comments must be understood.

[638] It is worth noting that the acting Deputy Principal Registrar provided no evidence to support his claims.

[639] In the light of Mr Anstey's comment that "there was a [role] review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and

this decision was documented”, it is also worth noting that the email sent from the acting Deputy Principal Registrar does not in any way document the **Agency Head’s decision** that “it was appropriate and necessary for some positions to be held at EL2 level.”

C. Assessment of the relevance of the “Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia” to Mr Anstey’s claim that “[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented”

[640] This leads to the second document that Ms Strangio identified as being a document (including classification assessments, broadbanding proposals etc) that was provided to Kate McMullan of the Australian Public Service Commission that supports her finding that allegations of impropriety and, presumably, unlawful conduct in the context of the recruitment of National Judicial Registrars were unsubstantiated because there had been “a role review process that had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load.”

[641] Ms Strangio claimed that the “Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia” supports Ms McMullan’s finding that allegations of impropriety and, presumably, unlawful conduct in the context of the recruitment of National Judicial Registrars were unsubstantiated because there had been “a role review process that had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load.”

[642] The *Judicial Registrar Recruitment* document is an eight page document. [571](#)

[643] The document commences as follows: [572](#)

Further to my memorandum of 22 August 2018 regarding the registrar recruitment exercise, this paper provides a further update on the recruitment exercise and recommendations endorsed by the recruitment panel for the appointment of candidates to the Senior National Judicial Registrar (SES2), National Judicial Registrar & District Registrar - VIC, QLD and WA (SES1), Judicial Registrar & District Registrar - TAS (Legal 2) and National Judicial Registrar – Native Title (SES1) positions, subject to your consideration and approval.

[644] Among other things, the author of the document sets out, in a table commencing on page 4, Federal Court registrar roles for which recruitment processes had been undertaken, identifies the classifications allocated to the roles under **rule 9** of the *Public Service Classification Rules 2000* (Cth), and identifies the candidates selected by the selection committees for the relevant registrar roles in the Federal Court.

[645] One of the roles identified in the table is the “National Judicial Registrar & District Registrar – QLD Registry (SES1).” [573](#) I note that the National Judicial Registrar & District Registrar role is the Queensland District Registry of the Federal Court bears a Senior Executive Band 1 classification. [574](#)

[646] The names of three lead candidates are set out in the column next to the position, and comments are set out in relation to the lead candidates in a column next to their names. [575](#) The name of the candidate selected by the selection committee consisting of Sia Lagos, David Pringle and Andrea Jarratt to fill the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role is the Queensland District Registry of the Federal Court is Murray Belcher. [576](#) Kerryn Vine-Camp, the Australian Public Service Commissioner’s representative for the purposes of the selection process for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy, certified that she had been a full participant in the selection process, and that the selection process complied with subsection 10A(2) of the *Public Service Act 1999* (Cth) and the *Australian Public Service Commissioner’s Directions 2016* (Cth). [577](#)

[647] In the column next to Mr Belcher’s name is the following typed comment: [578](#)

Appoint to position subject to Murray’s existing Judicial Registrar (Legal 2) position not backfilled.

Refer to Greenwood J memorandum

[648] Next to the typed comment is a handwritten note – “No SES”. [579](#)

[649] Another one of the roles identified in the table is the “National Judicial Registrar & District Registrar – WA Registry (SES1).” [580](#) I note that the National Judicial Registrar & District Registrar role is the Western Australia District Registry of the Federal Court bears a Senior Executive Band 1 classification in the table. [581](#)

[650] The names of three lead candidates are set out in the column next to the position, and comments are set out in relation to the lead candidates in a column next to their names. <sup>582</sup> The name of the candidate selected by the selection committee consisting of Sia Lagos, David Pringle and Andrea Jarratt to fill the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role is the Western Australia District Registry of the Federal Court is Russell Trott. <sup>583</sup> Kerryln Vine-Camp, the Australian Public Service Commissioner’s representative for the purposes of the selection process for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in the Western Australia District Registry, certified that she had been a full participant in the selection process, and that the selection process complied with subsection 10A(2) of the *Public Service Act 1999* (Cth) and the *Australian Public Service Commissioner’s Directions 2016* (Cth). <sup>584</sup>

[651] In the column next to Mr Trott’s name is the following typed comment: <sup>585</sup>

Appoint to position.

Russell’s existing Judicial Registrar (Legal 2) position: backfill with Matthew Benter.

[652] Next to the typed comment is a handwritten note – “No SES BUT DR IFA”. <sup>586</sup>

[653] The third of the roles identified in the table is the “National Judicial Registrar & District Registrar – VIC Registry (SES1).” <sup>587</sup> I note that the National Judicial Registrar & District Registrar role is the Victoria District Registry of the Federal Court bears a Senior Executive Band 1 classification in the table. <sup>588</sup>

[654] The names of four lead candidates are set out in the column next to the position, and comments are set out in relation to four candidates in a column next to their names. <sup>589</sup> The name of the candidate selected by the selection committee consisting of Sia Lagos, David Pringle and Andrea Jarratt to fill the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role is the Victoria District Registry of the Federal Court is Tim Luxton. <sup>590</sup> Kerryln Vine-Camp, the Australian Public Service Commissioner’s representative for the purposes of the selection process for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in the Victoria District Registry, certified that she had been a full participant in the selection process, and that the selection process complied with subsection 10A(2) of the *Public Service Act 1999* (Cth) and the *Australian Public Service Commissioner’s Directions 2016* (Cth). <sup>591</sup>

[655] One of the unsuccessful candidates for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in the Victoria District Registry was Claire Gitsham. <sup>592</sup>

[656] In the column next to Ms Gitsham's name is the following typed comment: [593](#)

Appoint to backfill vacancy Judicial Registrar – Legal 2 position (Melb), previously Tim Luxton's role. Would require allowance equivalent to SES1. Expected to be budget neutral.

[657] Next to the typed comment is a handwritten note – "Budget". [594](#)

[658] I draw your attention to the fact that Ms Gitsham was to "backfill" a "Judicial Registrar – Legal 2 position (Melb)", which was "previously Tim Luxton's role." [595](#) There is no mention whatever of an Executive Level 2 classified National Judicial Registrar role in the *Judicial Registrar Recruitment* document. Nor is there any mention of Claire Gitsham being engaged to fill an Executive Level 2 classified National Judicial Registrar role in the *Judicial Registrar Recruitment* document.

[659] On the eighth page of the document is a handwritten note, which reads:

Sia

Changes to be managed within 17/18 NOR appropriation. Proposed recruitment approved subject to me seeing & approving reconciliation of costs against budget by Finance Dept (Kat Hunter & Catherine Sullivan).

SES positions WA & QLD not to be filled – positions to be transferred to Sydney – WA & QLD DRs to be filled at Legal 2 with allowance (IFAs) if possible.

[660] The document was signed by Warwick Soden and dated "25/9/18".

[661] I now proceed to demonstrate why Mr Anstey's claim that "[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented" is unjustified.

[662] It has already been established that:

a) under the *Public Service Act 1999* (Cth), the Commissioner's functions include strengthening the professionalism of the Australian Public Service and facilitating continuous improvement in workforce management;<sup>596</sup> upholding high standards of integrity and conduct in the Australian Public Service;<sup>597</sup> developing, reviewing and evaluating workforce management policies and practices;<sup>598</sup> and doing anything incidental to or conducive to the performance of the Commissioner's functions; <sup>599</sup> and

b) the *Australian Public Service Classification Guide* sources its existence in the legislated functions of the Australian Public Service Commissioner;

c) the *Australian Public Service Classification Guide* provides that "[t]horough information and documentation procedures in relation to classification decisions are necessary elements in safeguarding the integrity of the process;" <sup>600</sup> "[a] decision to allocate a new or revised classification level to a job is made under delegated authority under the *Public Service Act 1999* and the *Public Service Classification Rules 2000*", and that "[t]his means that a record of decision **must** be made, including the reasons for the decision"; <sup>601</sup> documenting reasons for the classification decision is **necessary** to safeguard the integrity and transparency of the decision outcome; <sup>602</sup> in the context of documenting classification decisions, "a record **must** be kept of decisions made when exercising authority under the [Public Service] Act or the Classification Rules"; <sup>603</sup> and

d) the instructions contained in the *Australian Public Service Classification Guide* are communicated in mandatory language; and

e) in essence, there is no discretion on the part of an Agency Head, or his or her delegate, to refuse to gather evidence in a structured and systematic way to understand the role; or to refuse to conduct an assessment against established criteria, including the work level standards, because "[t]he allocation of an APS Level classification, Executive Level classification or SES classification **must** be based on the work value of the group of duties **described in the work level standards for that classification**, issued in writing, by the Commissioner"; or to fail to maintain documentary records of the decision by which a classification is allocated to a role, as well as the reasons for that decision; and

f) Agency Heads, <sup>604</sup> Statutory Office Holders, <sup>605</sup> and APS employees are legally obligated to, at all times, behave in a way that upholds the APS Values, <sup>606</sup> which includes acting in a way that is right and proper, as well as technically and legally correct or preferable; <sup>607</sup> and

g) it cannot be contended that it is ever right and proper, as well as technically and legally correct or preferable to dismiss the mandatory instructions of the Australian Public Service Commissioner and conduct a role evaluation with a view to allocating a classification where i) evidence is not gathered in a structured and systematic way to understand the role; ii) the role is not assessed and measured against established criteria, including the work level standards, particularly because rule 9(2A) of the *Public Service Classification Rules 2000* (Cth) requires that “[t]he allocation of an APS Level classification, Executive Level classification or SES classification **must** be based on the work value of the group of duties **described in the work level standards for that classification**, issued in writing, by the Commissioner”; and iii) documentary records of the decision by which a classification is allocated to a role, as well as the reasons for that decision, are not properly documented.

[663] First and plainly, nothing in the *Judicial Registrar Recruitment* document even comes close to supporting the view that a role review of the National Judicial Registrar role had been conducted such that an Executive Level 2 classification had been to the groups of duties for that role based on the work value described in the work level standards for that classification.

[664] Second, it has already been established that:

a) role evaluation records prepared between 1 January 2017 and 31 December 2020, that show that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar roles in Queensland and Western Australia were, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated Executive Level 2 classifications for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth) do not exist;<sup>608</sup> and

b) Mr Soden’s (the Agency Head’s) comments “WA & QLD DRs to be filled at Legal 2 with allowance (IFAs) if possible” on the eighth page of the *Judicial Registrar Recruitment* document <sup>609</sup> could not possibly relate to the allocation of Executive Level 2 (i.e. Legal 2) classifications to the groups of duties for the National Judicial Registrar & District Registrar roles in Queensland and Western Australia because consideration of an independent flexibility arrangement or its use is of no relevance to the allocation of an approved classification, under **rule 9** of the *Public Service Classification Rules 2000* (Cth), to each group of duties to be performed in any agency, and, as such, the comments are actually about the allocation of Executive Level 2 (i.e. Legal 2) classifications to Murray Belcher and Russell Trott pursuant to **rule 6** of the *Public Service Classification Rules 2000* (Cth);<sup>610</sup> and

c) Mr Soden’s statement that the SES “positions [are] to be transferred to Sydney” could not possibly mean that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar roles in the Queensland and Western Australia District Registries would be transferred to Sydney because a District Registrar is, by law, required to be located in the District Registry of the relevant State,<sup>611</sup> and that, rather, and was actually the case, the classification that would have been allocated

to District Registrars were, under **rule 6** of the *Public Service Classification Rules 2000* (Cth), allocated (or, as happened in one case, proposed to be allocated) to people based in Sydney (i.e. Susan O'Connor and Drew Pearson). [612](#)

[665] The most and best that can be said of Mr Anstey's finding that "the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented" is that Mr Soden had, in the absence of a lawful role review for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar roles in the Queensland and Western Australia District Registries, decided to allocate Executive Level 2 (i.e. Legal 2) classifications to Murray Belcher and Russell Trott under **rule 6** of the *Public Service Classification Rules 2000* (Cth).

[666] In the proven absence of any documentary evidence of role evaluation records, prepared between 1 January 2017 and 31 December 2020, which show that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar roles in Queensland and Western Australia were, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated Executive Level 2 classifications for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth), [613](#) Mr Anstey's finding that the Agency Head's decision to allocate Executive Level 2 classifications to Murray Belcher and Russell Trott under **rule 6** of the *Public Service Classification Rules 2000* (Cth) made it "reasonably open" for "the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented" is absurd. It is the mark of a very confused and ill-informed mind. It is the mark of a person who has a pathetic command of the law. It is the mark of a person who would dismiss the explicit legislative requirement that findings of fact made by a public interest disclosure investigator be based on logically probative evidence, [614](#) and that the evidence relied on in the investigation be relevant. [615](#) Indeed, it is the mark of an incompetent (or archtypal?) public servant.

[667] It therefore follows that the "Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia" cannot reasonably be relied on by Mr Anstey's claim that "[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a [role] review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented."

[668] At this point, it is worth noting that even Charmaine Sims, the General Counsel of the Australian Public Service Commission, has had trouble justifying how it is that the "Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia" supports Kate McMullan's finding that allegations of impropriety and, presumably, unlawful conduct in the context of the recruitment of National Judicial Registrars were unsubstantiated because there had been "a role review process that had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load."

[669] According to submissions provided to the Office of the Australian Information Commissioner on 3 November 2022, Charmaine Sims states: [616](#)

Document 2 (Judicial Registrar Recruitment Outcome) was prepared by the Federal Court in the context of a recruitment process and was provided to Ms McMullan during the course of a PID investigation. The Commission acknowledges the primary purpose of the document is not for a role review. However, in the Commission's view, this document provides the elements required at a high level for a role review **to be** conducted.

[670] No supporting reasons are provided to support Ms Sims' assertion that "in the Commission's view, [the Judicial Registrar Recruitment Outcome] document provides the elements required at a high level for a role review **to be** conducted." Nor is there any evidence that the "role review" was **actually** conducted. On the contrary, a freedom of information decision maker in the Federal Court of Australia has, in response to a request for the role evaluation records prepared between 1 January 2017 and 31 December 2020, that show that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar roles in Queensland and Western Australia were, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated Executive Level 2 classifications for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth), [617](#) explicitly refused to provide access to those documents because they do not exist or cannot be found. [618](#)

[671] I doubt the Information Commissioner will be quite as confused and ill-informed as Mark Anstey has been when the time comes to assess whether the *Judicial Registrar Recruitment* document is a document "that support[s] acting assistant commissioner Kate McMullan's conclusion that, in relation to the 'National Judicial Registrar role', 'a role review process ... had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load.'"

D. Public concessions made by decision makers in the Federal Court of Australia about "role reviews" conducted in respect of the National Judicial Registrar role

[672] As has already been noted, an access applicant applied, under the *Freedom of Information Act 1982* (Cth), to the Australian Public Service Commission for access to "any and all documents (including but not limited to classification evaluation documents prepared for the 'Legal 2' and 'SES1' classification level registrar positions referred to in an Australian article published on 9 February 2022 titled Federal Court boss warned on job rule sidestep) that support acting assistant commissioner Kate McMullan's conclusion that, in relation to the 'National Judicial Registrar role', 'a role review process ... had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load'" [619](#) and Giorgina Strangio claimed that there were two documents that met the terms of that access request: a) the "Email correspondence between Commission and Federal Court of Australia titled 'PRIVATE AND CONFIDENTIAL' dated 27 October 2020"; and b) the "Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia." [620](#) Ms Strangio refused to grant access to the documents on public interest grounds.

[673] I now turn to several freedom of information decisions that outright contradict the freedom of information decisions that were made by decision makers in the Australian Public Service Commission about the existence of documents supporting Kate McMullan's finding that "allegations of impropriety and, presumably, unlawful conduct in the context of the recruitment of National Judicial Registrars were unsubstantiated because there had been 'a role review process that had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load.'"

[674] First, a near identically worded freedom of information request was also addressed to the Federal Court of Australia.

[675] On 20 March 2022, an access applicant applied to the Federal Court of Australia for access to "any and all documents (including but not limited to classification evaluation documents prepared for the 'Legal 2' and 'SES1' classification level registrar positions referred to in an Australian article published on 9 February 2022 titled Federal Court boss warned on job rule sidestep) that support acting assistant commissioner Kate McMullan's conclusion that, in relation to the 'National Judicial Registrar role', 'a role review process ... had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load.'"

[621](#)

[676] On 20 June 2022, Nicola Colbran, National Judicial Registrar & District Registrar of the South Australia District Registry, and an authorised decision maker for the Federal Court of Australia under the *Freedom of Information Act 1982* (Cth), set aside Registrar Claire Hammerton Cole's initial decision [622](#) and, on internal review, refused to provide access to the requested documents pursuant to section 24A of the *Freedom of Information Act 1982* (Cth) because "the documents cannot be found or do not exist." [623](#)

[677] Ms Colbran, the most senior Federal Court registrar in South Australia, who regularly exercises the judicial power of the Commonwealth under direction and, as such, knows a thing or two about logically probative evidence and relevant evidence, was unconvinced that there were any documents in the possession of the Federal Court of Australia that in any way "support acting assistant commissioner Kate McMullan's conclusion that, in relation to the 'National Judicial Registrar role', 'a role review process ... had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load.'" Ms Colbran explicitly stated that the documents being sought, which were "1. documents that were provided to Kate McMullan; and 2. are evidence that 'a role review process that had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load'" did not exist. [624](#)

[678] It cannot both be the case that, as decision makers in the Australian Public Service Commission have contended, two documents, both of which find their provenance in the Federal Court of Australia, support Kate McMullan's finding that "in relation to the 'National Judicial Registrar role', 'a role review process ... had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load'" and that, as the most senior Federal Court registrar in South Australia stated, the Federal Court has no documents that support Kate McMullan's finding that "in relation to the 'National Judicial Registrar role', 'a role review process ... had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load.'" Either the documents exist, or they do not.

[679] Second, in response to a freedom of information request submitted to the Federal Court of Australia on 26 February 2022 for access to "i. documents recording the 'role review processes' that Kate McMullan based her conclusions on [and] ii. documents setting out the classification assessments for the Legal 2 and SES1 versions of the National Judicial Registrar role that Kate McMullan would presumably have referred to when drawing her conclusions ..." [625](#) National Judicial Registrar & District Registrar Nicola Colbran, a woman who knows a thing or two about logically probative evidence and relevant evidence, refused, pursuant to section 24A of the *Freedom of Information Act 1982* (Cth), to provide access to the requested documents because no such documents existed or could be found. [626](#)

[680] Third, freedom of information decision makers in the Federal Court of Australia have consistently refused to provide access to "the classification evaluation for the National Judicial Registrar role that Claire Gitsham applied for and succeeded in being selected to fill" [627](#) under section 24A of the *Freedom of Information Act 1982* (Cth) because the document does not exist / cannot be found. [628](#) The original decision maker, Claire Hammerton Cole, noted in her decision dated 6 June 2022: [629](#)

As there are no documents to provide to you, I have decided to refuse access to the classification evaluations requested ... under subsection 24A of the FOI Act.

[681] On internal review, the reviewing officer, National Judicial Registrar & District Registrar Nicola Colbran, a woman who knows a thing or two about logically probative evidence and relevant evidence, affirmed Claire Hammerton Cole's decision that "the classification evaluation for the National Judicial Registrar role that Claire Gitsham applied for and succeeded in being selected to fill" did not exist or could not be found. [630](#)

[682] Fourth, and most telling, in response to a freedom of information request for "access to the role evaluation records, prepared between 1 January 2017 and 31 December 2020, that show that the SES Band 1 classified National Judicial Registrar role in the Federal Court was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the Public

Service Classification Rules 2000”,<sup>631</sup> an authorised officer in the Federal Court refused to grant access to role evaluation records because they do not exist or cannot be found.<sup>632</sup>

[683] The upshot? Authorised decision makers in the Federal Court of Australia have consistently, publicly, unequivocally and unambiguously conceded the humiliating truth that there is no documentary evidence of a role evaluation record (or role review record) that shows that the National Judicial Registrar role in the Federal Court was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of **rule 9** of the *Public Service Classification Rules 2000* (Cth). Yet Mark Anstey claims “[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented.”<sup>633</sup> Go figure.

E. Conclusions about Mark Anstey’s finding that “[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented”

[684] I have shown that:

a) the General Counsel in the Australian Public Service Commission has sheepishly conceded, in response to a request for further information from the Office of the Australian Information Commissioner, that the *Judicial Registrar Recruitment Outcome* document, which was provided to the Office of the Commonwealth Ombudsman on 26 October 2021 in the form of Annexure EDR – 93, is not evidence of “a role review process that had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load”,<sup>634</sup> even though the Australian Public Service Commission originally tried to pass off that document as evidence of “a role review process that had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load”;<sup>635</sup>

b) Nicola Colbran, the most senior Federal Court registrar in South Australia, has publicly conceded the humiliating fact that there are no documents in the possession of the Federal Court of Australia demonstrating “in relation to the ‘National Judicial Registrar role’, ‘a role review process ... had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load’”;<sup>636</sup>

c) two registrars of the Federal Court of Australia have publicly conceded the humiliating fact that “the classification evaluation for the National Judicial Registrar role that Claire Gitsham applied for and succeeded in being selected to fill” [637](#) do not exist or cannot be found; [638](#)

d) B Henderson, an authorised decision maker for the purposes of the *Freedom of Information Act 1982* (Cth), has publicly conceded the humiliating fact that the “role evaluation records, prepared between 1 January 2017 and 31 December 2020, that show that the SES Band 1 classified National Judicial Registrar & District Registrar role in Queensland was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the Public Service Classification Rules 2000” do not exist; [639](#)

e) B Henderson, an authorised decision maker for the purposes of the *Freedom of Information Act 1982* (Cth), has publicly conceded the humiliating fact that the “role evaluation records, prepared between 1 January 2017 and 31 December 2020, that show that the SES Band 1 classified National Judicial Registrar & District Registrar role in Western Australia was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the Public Service Classification Rules 2000” do not exist; [640](#) and

f) B Henderson, an authorised decision maker for the purposes of the *Freedom of Information Act 1982* (Cth), has publicly conceded the humiliating fact that the “the role evaluation records, prepared between 1 January 2017 and 31 December 2020, that show that the SES Band 1 classified National Judicial Registrar role in the Federal Court was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the Public Service Classification Rules 2000” do not exist. [641](#)

[685] Thus, I have demonstrated that, contrary to Kate McMullan’s finding, there is no evidence of “a role review process that had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load.” [642](#) Of course, that is to say nothing of the impermissibility of classifying or reclassifying a role on the basis of the “work load” of the role, which is a patent error that Mark Anstey refused to engage with. [643](#)

[686] Now, putting to one side the impermissibility of classifying or reclassifying a role on the basis of the “work load” of that role, in order to support Kate McMullan’s finding that “allegations of impropriety and, presumably, unlawful conduct in the context of the recruitment of National Judicial Registrars were unsubstantiated because there had been ‘a role review process that had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load’”, Kate McMullan was required, pursuant to subsection 12(1) of

the *Public Interest Disclosure Standard 2013* (Cth), to base her finding of fact on logically probative evidence.

[687] Naturally, notations made by the Agency Head on the “Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia” [644](#) that Murray Belcher and Russell Trott were to be allocated Executive Level 2 (i.e. Legal 2) classifications pursuant to **rule 6** of the *Public Service Classification Rules 2000* (Cth) so that the Senior Executive Band 1 classifications that they were entitled to be allocated under **rule 6** (because both had, on their merits, been selected for promotion to Senior Executive Band 1 classification National Judicial Registrar & District Registrar roles) could be “transferred” to Sydney so that Susan O’Connor and Drew Pearson, candidates who had not applied for any Senior Executive Band 1 classified National Judicial Registrar vacancies, could be allocated those Senior Executive Band 1 classifications pursuant to **rule 6** are not **logically probative** of the fact that ‘a role review process [resulting] in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load.’”

[688] In order for the notation to be logically probative, the notations would, pursuant to **rule 9** of the *Public Service Classification Rules 2000* (Cth), have to, or have to tend to, logically prove the existence or non-existence of: [645](#)

a) the allocation of an approved classification to the groups of duties to be performed by the National Judicial Registrars & District Registrars in the Queensland and Western Australia District Registries; [646](#) and

b) the allocation of an Executive Level 2 classification to the group of duties based on the work value of the group of duties described in the work level standards for the Executive Level 2 classification, issued, in writing, by the Australian Public Service Commissioner. [647](#)

[689] The notations prove the existence of the Agency Head’s intention to allocate of approved classifications to Murray Belcher and Russell Trott, APS employees, under **rule 6** of the *Public Service Classification Rules 2000* (Cth). The notations do not prove, or tend to prove:

a) the allocation of an approved classification to the groups of duties to be performed by the National Judicial Registrars & District Registrars in the Queensland and Western Australia District Registries; [648](#) and

b) the allocation of an Executive Level 2 classification to the group of duties based on the work value of the group of duties described in the work level standards for the Executive Level 2 classification, issued, in writing, by the Australian Public Service Commissioner. [649](#)

[690] Therefore, the notations are not **logically probative** of the allocation of an approved classification (in this case, the allocation of Executive Level 2 classifications to the groups of duties for the National Judicial Registrar & District Registrar roles in the Queensland and Western Australia District Registries of the Federal Court of Australia) to the groups of duties to be performed for the National Judicial Registrar & District Registrar roles in the Queensland and Western Australia District Registries of the Federal Court of Australia.

[691] **More to the point**, in no universe is it possible for a person to conclude that, because the Agency Head recorded hand written notations on the “Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia” document that Murray Belcher and Russell Trott were to be allocated Executive Level 2 (i.e. Legal 2) classifications for the purposes of **rule 6** of the *Public Service Classification Rules 2000* (Cth) so that the Senior Executive Band 1 classifications that they were entitled to on their merits could be “transferred” to Sydney so that Susan O’Connor and Drew Pearson, two candidates who had not applied for the Senior Executive Band 1 classified National Judicial Registrar roles in Sydney (because those vacancies were never notified in the Public Service Gazette) [650](#) would receive those Senior Executive Band 1 classifications, a “role review process” was undertaken such that the Senior Executive Band 1 classified National Judicial Registrar role (a role that was separate and distinct to the National Judicial Registrar & **District Registrar** roles) was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth).

[692] So that the point is not lost on the Ombudsman’s finest, a notation on the “Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia” that an Executive Level 2 (i.e. Legal 2) classification is to be allocated to Murray Belcher, pursuant to **rule 6** of the *Public Service Classification Rules 2000* (Cth), does not prove the fact, or does not tend to prove the fact, that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Queensland was the subject of a “role review”, such that the role was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of **rule 9** of the *Public Service Classification Rules 2000* (Cth).

[693] All that the notation proves is that the Agency Head proposed to allocate an Executive Level 2 (i.e. Legal 2) classification to Murray Belcher, pursuant to rule 6 of the *Public Service Classification Rules 2000* (Cth), so that the Senior Executive Band 1 classification that would rightfully have been allocated to Murray Belcher under rule 6 of the *Public Service Classification Rules 2000* (Cth) could be transferred to Sydney to be allocated to either one of Susan O’Connor or Drew Pearson.

[694] Thus, the notation does not logically prove, or even tend to prove, that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Queensland was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth) (i.e. was the subject of a role review). Moreover, the notation, being a notation about the allocation of an Executive Level 2 (i.e. Legal 2) classification to Murray Belcher does not make the existence of the fact that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Queensland was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth) more probable or less probable than it would be without the evidence of the notation that Murray Belcher was to be allocated an Executive Level 2 classification for the purposes of rule 6 of the *Public Service Classification Rules 2000* (Cth).

[695] So that the point is not lost on the Ombudsman's finest, a notation on the "Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia" that an Executive Level 2 (i.e. Legal 2) classification is to be allocated to Russell Trott, pursuant to **rule 6** of the *Public Service Classification Rules 2000* (Cth), does not prove the fact, or does not tend to prove the fact, that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Western Australia was the subject of a "role review", such that the role was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of **rule 9** of the *Public Service Classification Rules 2000* (Cth).

[696] All that the notation proves is that the Agency Head proposed to allocate an Executive Level 2 (i.e. Legal 2) classification to Russell Trott, pursuant to rule 6 of the *Public Service Classification Rules 2000* (Cth), so that the Senior Executive Band 1 classification that would rightfully have been allocated to Murray Belcher under rule 6 of the *Public Service Classification Rules 2000* (Cth) could be transferred to Sydney to be allocated to either one of Susan O'Connor or Drew Pearson. Thus, the notation does not logically prove, or even tend to prove, that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Western Australia was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth) (i.e. was the subject of a role review).

[697] Moreover, the notation, being a notation about the allocation of an Executive Level 2 (i.e. Legal 2) classification to Russell Trott does not make the existence of the fact that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Western Australia was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth) more probable or less probable than it would be without the evidence of the notation that Russell Trott was to be allocated an Executive Level 2 classification for the purposes of rule 6 of the *Public Service Classification Rules 2000* (Cth).

[698] So that the point is not lost on the Ombudsman's finest, notations left by the Agency Head on the "Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia" to allocate Executive Level 2 (i.e. Legal 2) classifications to Murray Belcher and Russell Trott, pursuant to rule 6 of the *Public Service Classification Rules 2000* (Cth), are not logically probative of, or relevant to, a finding that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar roles in Queensland and Western Australia were, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated Executive Level 2 classifications for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth).

[699] ***Still less***, notations left by the Agency Head on the "Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia" to allocate Executive Level 2 (i.e. Legal 2) classifications to Murray Belcher and Russell Trott, pursuant to **rule 6** of the *Public Service Classification Rules 2000* (Cth), are not logically probative of the finding that the Senior Executive Band 1 National Judicial Registrar role, which neither Murray Belcher nor Russell Trott applied for, and which was never publicly notified in the Public Service Gazette, <sup>651</sup> and ***which is an altogether different to the Senior Executive Band 1 classified National Judicial Registrar & District Registrar roles in Queensland and Western Australia because it has nothing to do with the essential District Registrar role in one of the District Registries of the Federal Court of Australia***, <sup>652</sup> was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated Executive Level 2 classifications for the purposes of **rule 9** of the *Public Service Classification Rules 2000* (Cth) (i.e. a role review).

[700] But so far as Mark Anstey is concerned, a notation left by the Agency Head on the "Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia" allocating Executive Level 2 classifications to Murray Belcher and Russell Trott is proof positive that the Senior Executive Band 1 classified National Judicial Registrar role, ***which is entirely different and distinct to the National Judicial Registrar & District Registrar roles in Queensland and Western Australia*** (distinct because the Chief Executive Officer is obligated, under section 34(3) of the *Federal Court of Australia Act 1976* (Cth), to ensure that there is a District Registrar resident in each State of the Federation, and because the National Judicial Registrar role is entirely discretionary and not the District Registrar of District Registry of the Federal Court), was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of **rule 9** of the *Public Service Classification Rules 2000* (Cth) (i.e. the subject of a "role review").

[701] Mark Anstey's reasoning is manifestly absurd; it is sheer idiocy.

[702] There is no logically probative or relevant evidence <sup>653</sup> that demonstrates that the Senior Executive Band 1 classified National Judicial Registrar role, which is entirely different and distinct to the National Judicial Registrar & District Registrar roles in Queensland and Western Australia was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, ever reclassified and allocated an Executive Level 2 classification for the purposes of

rule 9 of the Public Service Classification Rules 2000. Freedom of information decision makers in the Federal Court of Australia have, publicly and beyond a shadow of a doubt, put that to rest.

[703] Even the Australian Public Service Commission's General Counsel acknowledges that the "Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia", which is the only document that bears written notes recorded by the Agency Head of the Federal Court of Australia Statutory Agency, is not a role review document. [654](#)

[704] Despite all of what has been demonstrated, Mark Anstey insists that "[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented." Moreover, he refuses to identify the "documented" item of evidence which he relies on to conclude that it was "reasonably open to the PID Investigator to have concluded that there was a review conducted."

[705] ***There never was a role review of the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Queensland.***

[706] ***There never was a role review of the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Western Australia.***

[707] ***There never was a role review of the Senior Executive Band 1 National Judicial Registrar role in the Federal Court.***

[708] ***There is no documented decision on the part of the Agency Head that "it was appropriate and necessary for some positions to be held at EL2 level."***

[709] There is only a documented notation, left by the Agency Head on the "Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia", that Murray Belcher and Russell Trott were to be unlawfully allocated Executive Level 2 (i.e. Legal 2) classifications, pursuant to **rule 6** of the *Public Service Classification Rules 2000* (Cth), so that the Senior Executive Band 1 classifications that they should have been allocated, having been selected for promotion to the Senior Executive Band 1 National Judicial Registrar & District Registrar roles on their merits, could be "transferred" to Sydney and allocated to Susan O'Connor and Drew Pearson – two people who did not apply for the Senior Executive Band 1 National Judicial Registrar role (which was never notified in the Public Service Gazette, contrary to section 20 of the *Australian Public*

*Service Commissioner's Directions 2016 (Cth)* – pursuant to rule 6 of the *Public Service Classification Rules 2000 (Cth)*.

[710] Mark Anstey's finding that "[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented" is, for the reasons set out in excruciating detail for the Ombudsman's finest, **plainly wrong** and, thus, unjustifiable.

#### *Ground 5*

[711] I adopt the reasoning in paragraphs [378] – [393].

#### *Ground 6*

[712] I challenge Mark Anstey's finding that "it was reasonably open to the PID Investigator to not make a finding of disclosable conduct relating to the decision and decision-making process that led to appointing these individuals to positions at EL2 level ... because it appears that relevant individuals were already employed by the agency at EL2 level."

[713] As noted above, Mr Anstey stated:

I understand you were also concerned that some individuals who applied for a position at SES level were subsequently appointed to positions at EL2 level. In my view, it was reasonably open to the PID Investigator to not make a finding of disclosable conduct relating to the decision and decision-making process that led to appointing these individuals to positions at EL2 level. This is because it appears that relevant individuals were already employed by the agency at EL2 level. Sections 25 and 26 of the *Public Service Act 1999* and section 46 of the Australian Public Service Commissioner's Directions 2002 allow for a person to be moved 'at level' or to be assigned different duties, i.e. a different role, at level. This provides agencies with the ability to move people into a different role, at level. In my view, it was open to the PID Investigator to not make a finding of disclosable conduct relating to the decision and decision-making process that led to existing substantive EL2 staff being moved 'at level' to a different role at the same EL2 level.

[714] Of the six people identified who were engaged as National Judicial Registrars (i.e. Phillip Allaway, Matthew Benter, Rupert Burns, Claire Gitsham, Susan O'Connor and Tuan Van Le) and allocated Executive Level 2 classifications pursuant to **rule 6** of the *Public Service Classification Rules 2000* (Cth), only three applied for Senior Executive Band 1 classified vacancies. Those three were Phillip Allaway, Matthew Benter and Claire Gitsham.

[715] Phillip Allaway applied for, <sup>655</sup>**and only applied for**, <sup>656</sup> the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in the Victoria District Registry of the Federal Court of Australia. Moreover, in response to a freedom of information request for access to “the job application submitted for the National Judicial Registrar role that Phillip Allaway was selected to fill”, <sup>657</sup> National Judicial Registrar & District Registrar Nicola Colbran set aside Claire Hammerton Cole’s original decision refusing to grant access to the application on public interest grounds and refused to grant access to the requested document on the ground that the document does not exist or cannot be found. <sup>658</sup> National Judicial Registrar & District Registrar Nicola Colbran also conceded, in response to a freedom of information request for access to “the vacancy notification for the National Judicial Registrar role that Phillip Allaway applied for and was selected to fill”, <sup>659</sup> that no such vacancy notification existed. <sup>660</sup> Therefore, the most senior Federal Court registrar in South Australia has publicly and unsurprisingly conceded the humiliating facts that:

a) there is no documentary evidence of the existence of Phillip Allaway’s application for the National Judicial Registrar role that was handed to him without a merit based selection process; <sup>661</sup> and

b) there is no documentary evidence of the existence of the vacancy notification published for the National Judicial Registrar role that Phillip Allaway was selected to fill.

[716] Phillip Allaway was shortlisted for an interview, <sup>662</sup> interviewed, <sup>663</sup> and was determined by the selection committee, which was made up of Sia Lagos, David Pringle and Andrea Jarratt, to be “not successful.” <sup>664</sup> Phillip Allaway was, at the time of the shortlisting and selection process, an internal candidate, being a “Judicial Registrar”. <sup>665</sup>

[717] Matthew Benter, an **external candidate**, <sup>666</sup> applied for, <sup>667</sup>**and only applied for**, <sup>668</sup> the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in the Western Australia District Registry of the Federal Court of Australia. Moreover, in response to a freedom of information request for access to “the job application submitted for the National Judicial Registrar role that Matthew Benter was selected to fill”, <sup>669</sup> National Judicial Registrar & District Registrar Nicola Colbran set aside Claire Hammerton Cole’s original decision refusing to grant access to the application on public interest grounds and refused to grant access to the requested document on the ground that the document does not exist or cannot be found. <sup>670</sup> National Judicial Registrar & District Registrar Nicola Colbran also conceded, in response to a freedom of information request for access to “the vacancy notice for the National Judicial Registrar role, published in the Public Service Gazette or elsewhere, that Matthew Benter applied for and succeeded in being selected to fill”, <sup>671</sup> that

no such vacancy notification existed. <sup>672</sup> Therefore, the most senior Federal Court registrar in South Australian has publicly and unsurprisingly conceded the humiliating facts that:

- a) there is no documentary evidence of the existence of Matthew Benter's application for the National Judicial Registrar role that was handed to him without a merit based selection process; <sup>673</sup> and
- b) there is no documentary evidence of the existence of the vacancy notification published for the National Judicial Registrar role that Matthew Benter was selected to fill.

[718] Matthew Benter was shortlisted for an interview, <sup>674</sup> interviewed, and was determined by the selection committee, which was made up of Sia Lagos, David Pringle and Andrea Jarratt, to not be the most meritorious candidate. <sup>675</sup> Nonetheless, the selection committee stated in the selection report for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in the Western Australia District Registry that Matthew Benter was "recommended for a different role in the NOR." <sup>676</sup>

[719] Claire Gitsham, an **external candidate**, <sup>677</sup> applied for, <sup>678</sup> **and only applied for**, <sup>679</sup> the:

a) Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in the Victoria District Registry of the Federal Court of Australia; <sup>680</sup> and

b) Senior Executive Band 2 classified Senior National Judicial Registrar vacancy in the Federal Court of Australia. <sup>681</sup>

[720] Moreover, in response to a freedom of information request for access to "the job application submitted for the National Judicial Registrar role that Claire Gitsham was selected to fill", <sup>682</sup> National Judicial Registrar & District Registrar Nicola Colbran set aside Claire Hammerton Cole's original decision refusing to grant access to the application on public interest grounds and refused to grant access to the requested document on the ground that the document does not exist or cannot be found. <sup>683</sup> National Judicial Registrar & District Registrar Nicola Colbran also conceded, in response to a freedom of information request for access to "the vacancy notice for the National Judicial Registrar role, published in the Public Service Gazette or elsewhere, that Claire Gitsham applied for and succeeded in being selected to fill", <sup>684</sup> that no such vacancy notification existed. <sup>685</sup> Therefore, the most senior Federal Court registrar in South Australian has publicly and unsurprisingly conceded the humiliating facts that:

a) there is no documentary evidence of the existence of Claire Gitsham's application for the National Judicial Registrar role that was handed to her without a merit based selection process; [686](#) and

b) there is no documentary evidence of the existence of the vacancy notification published for the National Judicial Registrar role that was handed over to Claire Gitsham.

[721] Claire Gitsham was not shortlisted for interview for the Senior Executive Band 2 classified Senior National Judicial Registrar vacancy, [687](#) but was shortlisted for interview for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in the Victoria District Registry of the Federal Court. [688](#) Claire Gitsham was interviewed for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in the Victoria District Registry, and was determined by the selection committee, which was made up of Sia Lagos, David Pringle and Andrea Jarratt, to not be the most meritorious candidate. [689](#) Nonetheless, the selection committee stated in the selection report for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in the Victoria District Registry that Claire Gitsham was "[r]ecommended for a different role in the NOR team." [690](#)

[722] Thus, and contrary to Mark Anstey's finding that "some individuals who applied for a position at SES level were subsequently appointed to positions at EL2 level" and "were already employed by the agency at EL2 level", only one individual (which is plainly not "some"), Phillip Allaway, "applied for a position at the SES level" and was "subsequently appointed to [a National Judicial Registrar position] at EL2 level" having already been employed by the agency at EL2 level (strictly speaking, APS employees are employed by the Commonwealth of Australia, and not a Statutory Agency, which does not have a legal identity distinct to the Commonwealth). [691](#) Thus, the majority of the individuals, including Claire Gitsham and Matthew Benter, who applied for positions at SES level, and were subsequently engaged as National Judicial Registrars in the Federal Court and allocated Executive Level 2 classifications pursuant to **rule 6** of the *Public Service Classification Rules 2000* (Cth), were **not** already employed by the Commonwealth of Australia.

[723] It follows that any attempt to rely on Mark Anstey's findings that "some individuals who applied for a position at SES level were subsequently appointed to positions at EL2 level" and "were already employed by the agency at EL2 level" to exculpate Kate McMullan for her inadequate public interest disclosure investigation is vitiated by the falsehood of those findings.

[724] Claire Gitsham was not an APS employee at the time she applied for a Senior Executive Service position in the Federal Court of Australia. Claire Gitsham was not moved "at level" into an Executive Level 2 classified National Judicial Registrar vacancy (as I have already explained, there has never been a role evaluation for an Executive Level 2 classified National Judicial Registrar role and, thus, no such vacancy has ever formally existed in the Federal Court). Mark Anstey's findings are, thus, characteristically confused and misinformed.

## Ground 7

[725] Mr Anstey's claims about the "SES cap" are, in the light of the evidence, misinformed.

[726] Mark Anstey stated:

In my view, when caps are in place – whether at SES or APS level – it is open to an agency to use an IFA to attract or retain talent if this meets a genuine operational need of the agency. Such a practice would not be a case of 'getting around' a cap in the sense of frustrating the underlying purpose of a cap, which is to limit the number of permanent employees at particular level.

[727] First, there is no cap on APS level employees. There is only an SES cap.

[728] Second, as has been consistently and repeatedly proved in this email, there never was a "role review" of the Senior Executive Band 1 classified National Judicial Registrar role such that, for the purposes of **rule 9** of the *Public Service Classification Rules 2000* (Cth), the Agency Head of the Federal Court of Australia Statutory Agency, or his delegate, did, in light of the work value of the group of duties described in the work level standards and a proper job analysis, allocate and Executive Level 2 classification to the National Judicial Registrar role.

[729] Third, the evidence before Mark Anstey was such that administrators in the Federal Court of Australia readily acknowledged undermining the SES cap "in the sense of frustrating the underlying purpose of a cap, which is to limit the number of permanent employees at particular level." [692](#)

[730] Mr Anstey had before him an email prepared by Matt Asquith, Assistant Director of People and Culture in the Federal Court of Australia. [693](#) The email was sent from Matt Asquith to Sia Lagos, Darrin Moy, Scott Tredwell and Andrea Jarratt on 26 October 2020. [694](#) The email has an "unclassified" classification. [695](#) In that email, Mr Asquith stated: [696](#)

Darrin and I have worked on this and the proposed response is as follows ...

2. There is no document that outlines that the National Judicial Registrar position can be at either the Executive Level 2 or SES Band 1 classification because this is not the case every

time we recruit for a National Judicial Registrar. The decision on which classification is relevant, is primarily based on two things:

1. The additional responsibilities on top of the core registrar work that the SES employees undertake – such as heading a program, or managing an area; and
2. The SES cap the Court has, and if the positions can fit within the cap.

Individual Flexibility Agreements are used, where applicable to compensate for the additional (sic) a person would undertake higher than (sic) the duties undertaken at the Executive Level 2 level. This is often the case given that the agency has an SES Cap of 21.

[731] In response to Matt Asquith's email, Scott Tredwell, the Federal Court's then acting Deputy Principal Registrar sent an email to Matt Asquith, Darrin Moy, Sia Lagos and Andrea Jarratt, stating:<sup>697</sup>

In respect of the proposed response below. I have some concerns regarding our proposed statements in respect of the SES Cap and our use of Individual Flexibility Agreements to, in effect, get around the cap.

I'm also wondering how our response sits against the Public Service Classification Rules 2000 (Cth), particularly Rules 6 to 10.

[732] It is obvious on the evidence before Mark Anstey that Matt Asquith confesses that "there is no document that outlines that the National Judicial Registrar position can be at either the Executive Level 2 or SES Band 1 classification", <sup>698</sup> which is unsurprising because, as I have consistently and repeatedly proved, contrary to Kate McMullan's findings, there never was a "role review" of the Senior Executive Band 1 classified National Judicial Registrar role such that, for the purposes of **rule 9** of the *Public Service Classification Rules 2000* (Cth), the Agency Head of the Federal Court of Australia Statutory Agency, or his delegate, did, in light of the work value of the group of duties described in the work level standards and a proper job analysis, allocate an Executive Level 2 classification to the National Judicial Registrar role.

[733] It is obvious on the evidence before Mark Anstey that the classification that is allocated to an individual, under **rule 6** of the *Public Service Classification Rules 2000* (Cth), is "primarily based" on "[t]he additional responsibilities on top of the core registrar work that the **SES employees** undertake" (notice that National Judicial Registrars are **SES employees**) and "[t]he SES cap the Court has, and if the position can fit within the cap." <sup>699</sup> As Matt Asquith shamelessly admits, individual flexibility arrangements are used to supplement the incomes of National Judicial Registrars who have been allocated an Executive Level 2 classification under **rule 6** of the *Public Service Classification Rules 2000* (Cth), particularly where the work value for the groups of duties to be performed is "higher than" the work value of the groups of duties based on the Commissioner's work level standards for the Executive Level 2 classification.

[734] So that it is not lost on the Ombudsman's finest, let me reiterate the point. I have consistently and repeatedly proved that there never was a "role review" of the Senior Executive Band 1 classified National Judicial Registrar role such that, for the purposes of **rule 9** of the *Public Service Classification Rules 2000* (Cth), the Agency Head of the Federal Court of Australia Statutory Agency, or his delegate, did, in light of the work value of the group of duties described in the work level standards and a proper job analysis, allocate and Executive Level 2 classification to the National Judicial Registrar role.

[735] Contrary to Mark Anstey's finding that the practice of using independent flexibility arrangements to remunerate National Judicial Registrars, who had been allocated Executive Level 2 classifications under **rule 6** of the *Public Service Classification Rules 2000* (Cth), is legitimate because it is "not be a case of 'getting around' a cap in the sense of frustrating the underlying purpose of a cap, which is to limit the number of permanent employees at particular level", the classification allocated by administrators in the Federal Court to an individual under rule 6 of the *Public Service Classification Rules 2000* (Cth) is, according to the evidence before Mark Anstey, primarily based on whether administrators in the Federal Court of Australia Statutory Agency can **"fit" a person within the capped number of SES positions available to the agency**. If an individual cannot be **"fit" within the capped number of SES positions available to the agency, then the person is allocated an Executive Level 2 classification** for the purposes of **rule 6** of the *Public Service Classification Rules 2000* (Cth), **and offered an individual flexibility arrangement to supplement their pay, particularly where the work value for the groups of duties to be performed is "higher than" the work value of the groups of duties based on the Commissioner's work level standards for the Executive Level 2 classification**. As Matt Asquith flatly and shameless admits, "[t]his is often the case given that the agency has an SES Cap of 21." [700](#)

[736] Despite the evidence, Mark Anstey insists:

In my view, when caps are in place – whether at SES or APS level – it is open to an agency to use an IFA to attract or retain talent if this meets a genuine operational need of the agency. Such a practice would not be a case of 'getting around' a cap in the sense of frustrating the underlying purpose of a cap, which is to limit the number of permanent employees at particular level.

[737] Plainly, Mark Anstey's findings reflect the terminally confused and misinformed state of his mind.

[738] Mr Anstey stated that “[s]ections 25 and 26 of the *Public Service Act 1999* and section 46 of the Australian Public Service Commissioner’s Directions 2022 allow for a person to be moved ‘at level’ or to be assigned different duties, i.e. a different role, at level.” That finding or conclusion is both irrelevant to the situation and, as a matter of law, incorrect.

[739] I will dispose of the reliance placed on section 26 of the *Public Service Act 1999* (Cth) and section 46 of the *Australian Public Service Commissioner’s Directions 2022* (Cth), before dealing with the application of section 25 of the *Public Service Act 1999* (Cth).

#### A. Section 26 of the *Public Service Act 1999* (Cth)

[740] Section 26 of the *Public Service Act 1999* (Cth) provides that the an Agency Head may enter into an agreement, in writing, with an APS employee for the employee to move to the Agency Head’s Agency from another Agency.

[741] In other words, section 26 of the *Public Service Act 1999* (Cth) governs inter-agency transfers effected by written agreements between an Agency Head of an Agency, with an APS employee from a different Agency.

[742] Claire Gitsham was not an APS employee when she was engaged into the Australian Public Service and allocated an Executive Level 2 classification, under **rule 6** of the *Public Service Classification Rules 2000* (Cth). Section 26 has no application to Claire Gitsham or the disclosable conduct relating to her engagement.

[743] For that matter, section 26 of the *Public Service Act 1999* (Cth) has no application to a single one of:

- a) Caitlin Wu;
- b) Rohan Muscat;
- c) Murray Belcher;

- d) Russell Trott;
- e) Susan O'Connor;
- f) Matthew Benter;
- g) Phillip Allaway;
- h) Rupert Burns; and / or
- i) Tuan Van Le,

because not a single one of these people were transferred into the Federal Court of Australia Statutory Agency from another Commonwealth Agency pursuant to a written agreement with the Agency Head of the Federal Court of Australia Statutory Agency.

[744] Thus, section 26 of the *Public Service Act 1999* (Cth) has no application to these people or to the disclosable conduct relating to their engagements of “promotions”.

[745] Therefore, Mr Anstey’s references to section 26 of the *Public Service Act 1999* (Cth) were pointless and irrelevant.

#### B. Section 46 of the *Australian Public Service Commissioner’s Directions 2022* (Cth)

[746] The internal disclosure was made to the Office of the Commonwealth Ombudsman on 23 March 2020.<sup>701</sup> Armed with the most basic understanding of logic, and of how times passes on planet Earth, one would have expected Mr Anstey to rely on enactments that were in effect at the time the relevant disclosable conduct took place (i.e. before the internal disclosure about the conduct was made to the Office of the Commonwealth Ombudsman on 23 March 2020). But Mr Anstey is a special kind of public servant. Apparently, an enactment (the *Australian Public Service Commissioner’s Directions 2022* (Cth)), which commenced operation in February 2022, applies to conduct that took place prior to the making of a public interest disclosure in March 2020. This, despite the oft quoted classical judgment *Fisher v Hebburn* (1960) 105 CLR 188, in which the High Court of Australia stated the law to be:

There can be no doubt that the general rule is that an amending enactment — or, for that matter, any enactment — is prima facie to be construed as having a **prospective operation only**. That is to say, it is to be prima facie construed as not attaching new legal consequences to facts, or event which occurred before its commencement.<sup>702</sup>

[747] But then why would Mark Anstey be bound by the judgments of the High Court of Australia on the that tenet of statutory interpretation that precludes the retrospective operation of legislation? He feels himself perfectly at liberty to trash unanimous judgments of the High Court in respect of the disclosing material information used to make decisions adverse to my rights and entitlements. So why not trash the High Court's classical judgment in *Fisher v Hebburn*?

[748] Plainly, Mr Anstey's references to the *Australian Public Service Commissioner's Directions 2022* (Cth), and section 46 of that instrument, were pointless and irrelevant.

### C. Section 25 of the *Public Service Act 1999* (Cth)

[749] Section 25 of the *Public Service Act 1999* (Cth) provides that an Agency Head may from time to time determine the duties of **an APS employee** in the Agency, and the place or places at which the duties are to be performed.

[750] Naturally, the duties of **an APS employee** that the Agency Head determines must be duties that broadly fall within the contours of the groups of duties to which the Agency Head has allocated an approved classification to under **rule 9** of the *Public Service Classification Rules 2000* (Cth) because an Agency Head cannot rely on a provision that is about the duties of **an APS employee** to determine the groups of duties for a role, which is independent of the APS employee. In other words, the power available to an Agency Head under section 25 of the *Public Service Act 1999* (Cth) to determine the duties of an APS employee presupposes the existence of the role, which is the set of duties to which a classification has been allocated pursuant to section 23 of the *Public Service Act 1999* (Cth), and under **rule 9** of the *Public Service Classification Rules 2000* (Cth).

[751] To the extent that Mark Anstey is suggesting, as he has, that an Agency Head may rely on section 25 of the *Public Service Act 1999* (Cth) to, at his or her "discretion" "determine the duties of an employee and determine an appropriate classification based on those duties", for the reasons that I have already set out in paragraphs 315 – 318 of this email, that is, as a matter of law, complete nonsense.

[752] A simple example will demonstrate just how misguided Mr Anstey's reasoning is.

[753] If, as Mark Anstey claims, “[section] 25 ... of the *Public Service Act 1999* (Cth) ... allow[s] for a person to be moved ‘at level’ or to be assigned different duties” in the sense that an Agency Head may, at his or her “discretion”, “determine the duties of an employee and determine an appropriate classification based on those duties”, then it would follow that the Agency Head of the Australian Taxation Office would be able to make an Executive Level 1 classified customer service team leader into:

a) an Executive Level 1 classified statistician; or

b) an Executive Level 1 classified actuary; or

c) an Executive Level 1 classified lawyer in the Australian Taxation Office,

without first establishing, based on the work value of the groups of duties [703](#) (as described in the relevant work level standards), [704](#) any one of those roles by allocating an approved classification to the groups of duties associated with those roles to the performed in the Agency. [705](#)

[754] But that is not how the *Public Service Act 1999* (Cth) works. Indeed, that is not how statutory interpretation works. Mark Anstey is not permitted to:

a) read words and concepts into section 25 of the *Public Service Act 1999* (Cth) that do not form part of that provision (e.g. claiming that an Agency Head may, at his or her “discretion”, “determine the duties of an employee and determine an appropriate classification based on those duties”);

b) entirely read down section 23 of the *Public Service Act 1999* (Cth);

c) entirely read down rule 9 of the *Public Service Classification Rules 2000* (Cth) (which have been made pursuant to rule 23 of the *Public Service Act 1999* (Cth)); and

d) ignore the *Australian Public Service Classification Guide*, which has been issued by the Australian Public Service Commissioner pursuant to functions and powers set out in section 41 of the *Public Service Act 1999* (Cth),

so that he can attempt to justify a preconceived conclusion (exculpating Kate McMullan for an inadequate investigation under the *Public Interest Disclosure Act 2013* (Cth)) because it would be far too inconvenient for the Office of the Commonwealth Ombudsman to deal with the consequences of a lawful determination of the way that Kate McMullan conducted her public interest disclosure investigation.

[755] But do not take my word for it.

[756] Here is the judgment of the plurality in the most cited case to have issued from the High Court of Australia in the last quarter century (and the second most cited case in the history of the High Court of Australia), *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 490: [706](#)

The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole". In *Commissioner for Railways (NSW) v Agalinos*, Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed.

A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court "to determine which is the leading provision and which the subordinate provision, and which must give way to the other". Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.

[757] One must give effect to the provisions of the totality of a statute by harmonising the provisions of that statute so that the unity of the provisions is, so far as it is possible, given effect to.

[758] Reading down provisions, introducing words and concepts into provisions, and ignoring the terms of provisions are not permissible when construing a statute as a whole. But what does Mark Anstey care? He feels himself perfectly at liberty to trash unanimous judgments of the High Court in respect of the disclosing material information used to make decisions adverse to my rights and entitlements. He feels himself perfectly at liberty to trash judgments of the High Court in respect of the retroactive application of legislation. So why not trash the High Court's classical judgment in *Project Blue Sky v Australian Broadcasting Authority*?

[759] Clearly, Mark Anstey's claim that "[section] 25 ... of the *Public Service Act 1999* allow[s] for a person to be moved 'at level' or to be assigned different duties, i.e. a different role, at level" is, as a matter of law, wrong.

[760] Clearly, Mark Anstey's claim that "[section] 25 ... of the *Public Service Act 1999* allow[s] for a person to be moved 'at level' or to be assigned different duties, i.e. a different role, at level" is inapplicable.

[761] Clearly, Mark Anstey's claim that "[section] 25 ... of the *Public Service Act 1999* allow[s] for a person to be moved 'at level' or to be assigned different duties, i.e. a different role, at level" is irrelevant.

[762] Clearly, Mark Anstey has no idea what he is doing.

## *Ground 9*

[763] I take issue with Mark Anstey's failure to address Ms McMullan's failure to investigate the allegation that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they engaged Claire Gitsham to fill an Executive Level 2 role for which there had been no role evaluation, and for which there was no merit based selection process.

[764] I have already proved that there was no evidence, before Kate McMullan, of a role evaluation for a National Judicial Registrar role that had, for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth), been allocated an Executive Level 2 classification.

[765] I have already proved that there is no evidence of a role evaluation for a National Judicial Registrar role that had, for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth), been allocated an Executive Level 2 classification, independent of whether that evidence was before Kate McMullan during her public interest disclosure investigation.

[766] I have already proved that administrators in the Federal Court of Australia allocate classifications to individuals, under **rule 6** of the *Public Service Classification Rules 2000* (Cth), for the National Judicial Registrar role based on “[t]he additional responsibilities on top of the core registrar work that the **SES employees** undertake” and the ability to “fit” that person into the Statutory Agency without transgressing the capped number of SES positions. [707](#)

[767] I have already shown that the Assistant Director of People and Culture in the Federal Court of Australia shamelessly admits that individual flexibility arrangements are used to supplement the incomes of National Judicial Registrars who have been allocated an Executive Level 2 classification under **rule 6** of the *Public Service Classification Rules 2000* (Cth), particularly where the work value for the groups of duties to be performed is “higher than” the work value of the groups of duties based on the Commissioner’s work level standards for the Executive Level 2 classification. [708](#) And I have already shown that Matt Asquith flatly and shameless admits, “[t]his is often the case given that the agency has an SES Cap of 21.” [709](#)

[768] As I pointed out in my complaint to the Office of the Commonwealth Ombudsman, which Mark Anstey “investigated”, there was no evidence before Ms McMullan that, among other things: [710](#)

a) an Executive Level 2 classified National Judicial Registrar vacancy had been notified in the Public Service Gazette and, as a consequence, that the vacancy was notified as open to all eligible members of the community;

b) any applications were received for an Executive Level 2 classified National Judicial Registrar vacancy that Ms Gitsham was engaged to fill; and

c) the aim and purpose of the selection process for the Executive Level 2 National Judicial Registrar role in the Victoria District Registry of the Federal Court had been determined in advance.

[769] In response to a freedom of information request for access to “the vacancy notice for the National Judicial Registrar role, published in the Public Service Gazette or elsewhere, that Claire Gitsham applied for and succeeded in being selected to fill”, [711](#) National Judicial Registrar & District

Registrar Nicola Colbran refused to provide access to the document, pursuant to section 24A of the *Freedom of Information Act 1982* (Cth), because the document does not exist. [712](#)

[770] In response to a freedom of information request for access to the “the job application submitted for the National Judicial Registrar role that Claire Gitsham was selected to fill” [713](#) National Judicial Registrar & District Registrar Nicola Colbran refused to provide access to the document, pursuant to section 24A of the *Freedom of Information Act 1982* (Cth), because the document does not exist or cannot be found. [714](#)

[771] Despite the fact that:

a) I have proved that there was no evidence, before Kate McMullan, of a role evaluation for a National Judicial Registrar role that had, for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth), been allocated an Executive Level 2 classification; and

b) I have proved that there is no evidence of a role evaluation for a National Judicial Registrar role that had, for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth), been allocated an Executive Level 2 classification, independent of whether that evidence was before Kate McMullan during her public interest disclosure investigation; and

c) I have proved that, contrary to the legislative requirements set out in section 20 of the *Australian Public Service Commissioner’s Guidelines 2016* (Cth) (which provides that a vacancy must be notified in order to meet the requirements for merit-based selection), no vacancy notice for the National Judicial Registrar role that Claire Gitsham was selected to fill (on a full-time, ongoing basis from 30 January 2019) [715](#) was published in the Public Service Gazette or elsewhere; [716](#) and

d) I have proved that there is no evidence that Claire Gitsham submitted a job application for the National Judicial Registrar role that she was selected to fill, [717](#) and for which she was granted an independent flexibility arrangement, which was used to increase her salary to \$210,000 [718](#) (some \$22,500 more than the Senior Executive Band 1 classified National Judicial Registrar & District Registrar of the Victoria District Registry, Tim Luxton), [719](#) after being allocated an Executive Level 2 classification, under rule 6 of the *Public Service Classification Rules 2000* (Cth),

Mark Anstey concluded that the allegations that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they engaged Claire Gitsham to fill an Executive Level 2 role for which there had been no role evaluation, and for which there was no

merit based selection process were not substantiated because he “found that most of the key findings [that Kate McMullan made] were not unreasonable for the Investigating Agency to make.” [720](#)

[772] Ms McMullan’s failure to address the allegations demonstrates the inadequacy of public interest disclosure investigation. It was not appropriate for Mr Anstey to terminate his investigation into Ms McMullan’s failure to address the allegation without providing something more than “I found that most of the key findings [that Kate McMullan made] were not unreasonable for the Investigating Agency to make” particularly because I have proved that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they engaged Claire Gitsham to fill an Executive Level 2 role for which there had been no role evaluation, and for which there was no merit based selection process (even though proving the allegations is emphatically not my duty).

[773] Plainly, Mark Anstey’s findings reflect the terminally confused and misinformed state of his mind.

#### *Relief sought*

[774] I request that:

a) Mr Anstey’s decision to terminate the investigation under the *Ombudsman Act 1976* (Cth) be set aside on the basis of the grounds of review articulated above (both general and specific);

b) the Ombudsman make a finding that Kate McMullan’s finding that “[t]he evidence provided indicates that as a result of a role review, a determination was made that NJR positions could be held at the SESB1 level in some registrars, and at the Legal 2 level in other registrars” was not based on evidence;

c) the Ombudsman make a finding that Kate McMullan’s finding that “[t]he evidence provided indicates that as a result of a role review, a determination was made that NJR positions could be held at the SESB1 level in some registrars, and at the Legal 2 level in other registrars” was not based on any evidence available to her;

d) the Ombudsman make a finding that Kate McMullan’s finding in respect of the National Judicial Registrar roles, which was “a role review process ... had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load” is not justifiable and is, thus, wrong because, first, it is not permissible to classify or reclassify a role on the basis of the workload of the role, and, second, there was not evidence before Ms McMullan, and there is actually no evidence simpliciter, that there ever was a “role review process” such that the National Judicial Registrar role had been allocated an Executive Level 2 classification for the purposes of **rule 9** of the *Public Service Classification Rules 2000* (Cth);

e) the Ombudsman make a finding that Kate McMullan contravened her statutory duty, under the *Public Interest Disclosure Act 2013* (Cth), by functionally refusing to investigate the disclosable conduct that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct by handing out an Executive Level 2 classification to Claire Gitsham, a person who was not employed in the Australian Public Service, under **rule 6** of the *Public Service Classification Rules 2000* (Cth) for a role i) that had never been allocated an Executive Level 2 classification under **rule 9** of the *Public Service Classification Rules 2000* (Cth); ii) that had never been the subject of a vacancy notification, which notified the Australian community that there was a role that eligible members of the community would be permitted to apply for; iii) the incumbent would receive a lavish independent flexibility arrangement, catapulting their pay packet some \$22,500 north of the most senior Senior Executive Band 1 classified role in the Victoria District Registry of the Court, even though the “substantive classification” for the role is, according to Kate McMullan and **no evidence whatsoever**, an Executive Level 2 classification under **rule 9** of the *Public Service Classification Rules 2000* (Cth), being a classification allocated to roles that are objectively less complex than Senior Executive Band 1 classified roles;

f) the Ombudsman make a finding that Kate McMullan failed to comply with procedures established under subsection 15(3) of the *Public Service Act 1999* (Cth) in investigating alleged breaches of the Code of Conduct and had thus failed to comply with paragraph 53(5)(b) of the *Public Interest Disclosure Act 2013* (Cth);

g) the Ombudsman prepare a report of his findings, and refer the matter back to the Australian Public Service Commissioner with a recommendation that the Commissioner reinvestigate the public interest disclosure according to law.

## **7. THE DECISION TO ENGAGE MATTHEW BENTER AS A NATIONAL JUDICIAL REGISTRAR**

### Allegation

[775] In essence, I alleged that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they engaged Matthew Benter to fill an Executive Level 2 role for which there had been no role evaluation, and for which there was no merit based selection process.

### Salient facts

[776] Matthew Benter **only** applied to fill the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in the Western Australia District Registry of the Federal Court of Australia.<sup>721</sup> Matthew Benter did not apply for the National Judicial Registrar role that she was handed.<sup>722</sup>

[777] The Senior Executive Service Band 1 classified National Judicial Registrar & District Registrar vacancy in the Western Australia District Registry of the Federal Court was notified in the Public Service Gazette.<sup>723</sup>

[778] According to the selection report for the Senior Executive Service Band 1 classified National Judicial Registrar & District Registrar vacancy in the Western Australia District Registry of the Federal Court, six candidates were shortlisted for interview.<sup>724</sup>

[779] Among the candidates shortlisted for interview to fill the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in the Western Australia District Registry of the Federal Court was Matthew Benter, a director at MKB Legal Consulting.<sup>725</sup>

[780] A selection committee consisting of Sia Lagos, the current Chief Executive Officer and Principal Registrar of the Federal Court, David Pringle, the current Chief Executive Officer and Principal Registrar of Division 1 of the Federal Circuit and Family Court, and Andrea Jarratt, the current Director of National Operations in the Federal Court, selected **Russell Trott** as the “recommended candidate” for promotion to the Senior Executive Service Band 1 classified National Judicial Registrar & District Registrar vacancy in the Western Australia District Registry of the Federal Court.<sup>726</sup> Matthew Benter was unsuccessful in securing the Senior Executive Service Band 1 classified National Judicial Registrar & District Registrar role in the Western Australia District Registry.<sup>727</sup> Despite failing to secure the Senior Executive Service Band 1 classified National Judicial Registrar & District Registrar role in the Western Australia District Registry, a selection committee consisting of Sia Lagos, David Pringle and Andrea Jarratt noted that Matthew Benter had been “[m]erit listed & recommended for a different role in the NOR.”<sup>728</sup>

[781] Sia Lagos, David Pringle and Andrea Jarratt certified reading the selection report and agreeing with the contents of the report.<sup>729</sup> They also certified being “aware of the correct policy and procedures for merit selection and certify that these have been followed”.<sup>730</sup>

[782] Sia Lagos, in her capacity as the then Agency Head’s delegate, endorsed the decision of the selection committee to select **Russell Trott** for promotion to the Senior Executive Service Band 1 classified National Judicial Registrar & District Registrar vacancy in the Western Australia District Registry of the Federal Court.<sup>731</sup>

[783] On 25 October 2018, Kerry Vine-Camp, the then First Assistant Commissioner of the Australian Public Service Commission, certified that she was, for the purposes of section 21 of the *Australian Public Service Commissioner’s Directions 2016* (Cth), a full participant in the selection process for the Senior Executive Service Band 1 classified National Judicial Registrar & District Registrar vacancy in the Western Australia District Registry, and certified that she had participated in all stages of the selection process, and that the selection process complied with subsection 10A(2) of the *Public Service Act 1999* (Cth) and the *Australian Public Service Commissioner’s Directions 2016* (Cth).<sup>732</sup>

[784] On 19 October 2018, Matthew Benter was offered a contract of employment to fill an Executive Level 2 National Judicial Registrar role in the Western Australia District Registry of the Court, on an ongoing, full-time basis.<sup>733</sup> The contract of employment was supplemented with an individual flexibility arrangement such that Matthew Benter’s base salary would be increased by some \$40,000 above the rate of pay ordinarily available to Executive Level 2 legal staff under the terms of the *Federal Court of Australia Enterprise Agreement 2018-2021* [2018] FWCA 4493.<sup>734</sup> Matthew Benter’s rate of pay was also more than the rate of pay awarded to Russell Trott, the person who was selected, by a selection panel consisting of Sia Lagos, David Pringle and Andrea Jarratt, for promotion to fill the **Senior Executive Band 1 classified** National Judicial Registrar & District Registrar vacancy in the Western Australia District Registry<sup>735</sup> (even though Russell Trott was ultimately denied lawful career progression to the Senior Executive Service so that the scarce Senior Executive Band 1 classification that should have been allocated to Mr Trott, pursuant to rule 6 of the *Public Service Classification Rules 2000* (Cth), was “transferred” to Sydney so that the classification could be allocated to Susan O’Connor or Drew Pearson, contrary to law).<sup>736</sup> Moreover, Matthew Benter’s rate of pay was higher than the rate of pay awarded to Tim Luxton, the person who was selected for promotion to fill the **Senior Executive Band 1** classified National Judicial Registrar & District Registrar vacancy in the Victoria District Registry<sup>737</sup> (i.e. an objectively more complex role given that it was allocated, under **rule 9** of the *Public Service Classification Rules 2000* (Cth), a Senior Executive Band 1 classification).<sup>738</sup>

[785] On 22 October 2018, Matthew Benter accepted the terms of the contract of employment provided to him to fill an Executive Level 2 National Judicial Registrar role in the Western Australia District Registry of the Court, on an ongoing, full-time basis, with the lavish \$40,000 increase in pay.<sup>739</sup>

Findings and outcomes of Kate McMullan's investigation under the *Public Interest Disclosure Act 2013* (Cth)

[786] The investigator, Kate McMullan, made several findings.

[787] In response to the allegation that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they engaged Matthew Benter to fill an Executive Level 2 role for which there had been no role evaluation, and for which there was no merit based selection process, Ms McMullan made the following finding:

I found no indication amongst the materials provided that Mr Belcher or Mr Trott were particularly targeted for reclassification of their roles ...

The material provided by FCA does indicate that Mr Belcher and Mr Trott applied for SESB1 positions and were ultimately placed into Legal 2 positions. However material provided by FCA also indicates that, following the advertisement of these positions and the finalisation of the recruitment process, a role review was undertaken ... The evidence provided indicates that as a result of a role review, a determination was made that NJR positions could be held at the SESB1 level in some registrars, and at the Legal 2 level in other registrars ... On the basis of the evidence and on the balance of probabilities, I find that this allegation is not substantiated.<sup>740</sup>

[788] Moreover, Ms McMullan stated that Mr Benter had applied for his role through a gazetted process and was appointed to the Executive Level 2 National Judicial Registrar position "following [a] gazetted process."<sup>741</sup> In respect of the selection process that saw Mr Benter selected to fill an Executive Level 2 National Judicial Registrar position in the Western Australia District Registry of the Federal Court, Ms McMullan concluded that "Ms Gitsham and Mr Benter were applicants in process NN10725159 and were offered, and accepted, Legal 2 positions following the role review activity referenced above."<sup>742</sup>

Errors alleged to have been committed by Kate McMullan in complaint lodged with the Office of the Commonwealth Ombudsman on 26 October 2021

[789] Ms McMullan made many errors but there were two fundamental errors, and a derivative error.

[790] First, there were problems with Ms McMullan’s finding that “following the advertisement of [the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – QLD and the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – WA] positions and the finalisation of the recruitment process, a role review was undertaken.” [743](#)

[791] Specifically, in order for Ms McMullan’s finding to be correct, it must be the case that a role review of a Senior Executive Band 1 classified National Judicial Registrar role, as distinct to the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – QLD role and the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – WA role, [744](#) was undertaken.[745](#) There was no evidence before Ms McMullan demonstrating that a role review had taken place such that the groups of duties associated with the National Judicial Registrar role had been allocated an Executive Level 2 classification. [746](#)

[792] Second, in order for Matthew Benter to have been lawfully engaged to fill an Executive Level 2 National Judicial Registrar role in the Western Australia District Registry of the Federal Court on an ongoing, full-time basis, and in order for Kate McMullan to have concluded that Matthew Benter was selected according to a merit based selection process, it was, among other things, necessary: [747](#)

a) for the vacancy, or a similar vacancy, in the Federal Court of Australia to be notified in the Public Service Gazette within a period of 12 months before the written decision to engage Mr Benter; [748](#) and

b) for the vacancy to have been notified as open to all eligible members of the community; [749](#) and

c) for the aim and purpose of the selection process for the Executive Level 2 National Judicial Registrar role in the Western Australia District Registry of the Federal Court to have been determined in advance; [750](#) and

d) for information about the selection process for the Executive Level 2 National Judicial Registrar role in the Western Australia District Registry of the Federal Court to have been readily available to applicants; [751](#) and

e) for the selection process for the Executive Level 2 National Judicial Registrar role in the Western Australia District Registry of the Federal Court to be appropriately documented. [752](#)

[793] Aside from the fact that there was no evidence before Ms McMullan that a role evaluation had been conducted for a National Judicial Registrar role which had been allocated an Executive Level 2 classification, there was no evidence before Ms McMullan that, among other things: [753](#)

a) an Executive Level 2 classified National Judicial Registrar vacancy had been notified in the Public Service Gazette and, as a consequence, that the vacancy was notified as open to all eligible members of the community;

b) any applications were received for an Executive Level 2 classified National Judicial Registrar vacancy that Mr Benter was engaged to fill; and

c) the aim and purpose of the selection process for the Executive Level 2 National Judicial Registrar role in the Western Australia District Registry of the Federal Court had been determined in advance.

[794] That Ms McMullan found that the allegations that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they engaged Matthew Benter to fill an Executive Level 2 role for which there had been no role evaluation, and for which there was no merit based selection process, were “on the basis of the evidence and on the balance of probabilities ... not substantiated” even though there was no evidence before Ms McMullan that:

a) a role review had taken place such that the National Judicial Registrar role had been allocated an Executive Level 2 classification for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth); and

b) Matthew Benter was selected to fill a National Judicial Registrar role bearing an Executive Level 2 classification in the course of a merit-based selection process,

demonstrated that Ms McMullan had failed, as part of her public interest disclosure investigation, to ascertain whether Matthew Benter had been engaged according to law and that, accordingly, Ms McMullan’s finding that “on the basis of the evidence and on the balance of probabilities, I find that this allegation is not substantiated” was made on something other than logically probative and relevant evidence. [754](#)

[795] Third, being the derivative error, Ms McMullan’s conclusion that the National Judicial Registrar could bear both an Executive Level 2 and Senior Executive Band 1 classification on no basis other than the relative work load and complexity of the work undertaken would mean that Ms McMullan was suggesting that a **constructive** broadbanding arrangement across a Senior Executive Band classification were permissible, even though it is explicitly prohibited under rule 9(5) of the *Public Service Classification Rules 2000* (Cth). [755](#)

#### Findings and outcomes of the investigation conducted by Mark Anstey of the Office of the Commonwealth Ombudsman

[796] On 12 December 2022, Mark Anstey, an acting Assistant Director in the Public Interest Disclosure Team of the Ombudsman’s Office, terminated an investigation, under the *Ombudsman Act 1976* (Cth), into the errors alleged to have been committed by Ms McMullan. [756](#)

[797] Mr Anstey claimed that the Ombudsman “cannot take any action that would cause an agency to reinvestigate a [public interest disclosure] ... because the [Public Interest Disclosure Act 2013 (Cth)] does not provide a mechanism for a finalised PID investigation to be reopened.” [757](#) The falsehood of that legal proposition has been part IV of this email.

[798] Mr Anstey claimed “most of the key findings were not unreasonable for the investigating agency to make.” [758](#) That proposition is false, not least for the reasons set out in part XI of this email. Further reasons demonstrating the falsehood of that proposition will be set out below.

[799] Mr Anstey concluded that “there is no practical outcome [the Ombudsman] could obtain by further investigating the complaint”, which, as I have demonstrated in part V of this email, is a falsehood, and, on that basis, terminated the investigation into the errors alleged to have been committed by Ms McMullan. [759](#)

[800] In terminating the investigation, Mr Anstey stated: [760](#)

I understand your view that there was not a properly documented review of roles and classifications that would allow an Agency Head to appoint individuals to the relevant position at SES1 or EL2 level.

Conducting and documenting a role review is not set down in legislation. The APS Classification Guide recommends a role review or role evaluation be carried out in certain circumstances, including reviews conducted because of a restructure or reorganisation within an agency. That said, ultimately it is at the discretion of the Agency Head to determine the duties of an employee and determine an appropriate classification based on those duties.

The PID Investigator concluded the material available indicated there had been a role review and the decision to reclassify these positions was made “*on the basis of the relative volume and complexity of work undertaken in the various registrars (sic)*”. I accept that you dispute this. I also appreciate the reasons for the decision could have been better communicated to agency staff, as the PID Investigator noted, and similarly the internal records could have been more detailed. It nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented.

[801] Mr Anstey also stated:[761](#)

I note your view the PID Investigator failed to address a key legal issue at the start of the investigation – this being the holding of a role at SES1 and EL2 classifications. As I understand it, you were concerned the implication of the PID investigation report was that “*it is acceptable for broadbanding arrangements to extend to SES classification*”. As you noted, there is no broadbanding between EL classifications and SES ...

While I acknowledge your views, what happened in this case does not appear to be a case of unlawful broadbanding – this being broadbanding between EL and SES classifications. In your complaint you said the records indicated a “*proposition that the ... role could bear a classification of both Executive Level 2 and SES Band 1*”. In my view, it appears the agency decided the position could have a classification of *either* EL2 or SES, depending on the requirements of the specific role ...

The arrangements the agency put in place for several appointees did not allow individuals appointed to the positions at EL2 level via an individual flexibility arrangement (IFA) to progress to the SES level without the need for an open, competitive selection process. As the Investigator noted, a decision was made that “*the NJR positions could be held at the SESB1 level in some registrars (sic), and at the Legal 2 level in other registrars (sic)*” due to an assessment about the differing volume and complexity of work in each registry. This does not appear to be a case of unlawful broadbanding. I accept the report could have provided more detail about how this alleged issue was assessed. However, the PID Investigator did not fail to identify and consider the issue.

Related to the PID Investigator’s alleged failure to properly consider this alleged unlawful broadbanding was your complaint the recruitment process inappropriately sought to avoid a cap that may have been placed on the number of positions to be offered at each level. In my view, when caps are in place – whether at SES or APS level – it is open to an agency to use an IFA to attract or retain talent if this meets a genuine operational need of the agency. Such a

practice would not be a case of ‘getting around’ a cap in the sense of frustrating the underlying purpose of a cap, which is to limit the number of permanent employees at particular level. Unlike the entitlements that attach to permanent appointments to the APS a person’s IFA can be terminated at any time, including if it ceases to meet a genuine operational need. This is consistent with the accepted practice that agencies can use labour hire staff to meet genuine operational needs at considerably higher cost than permanent or non-ongoing staff so long as these actions are commensurate with relevant requirements under the *Public Governance, Performance and Accountability Act* (the PGPA Act).

I understand you were also concerned that some individuals who applied for a position at SES level were subsequently appointed to positions at EL2 level. In my view, it was reasonably open to the PID Investigator to not make a finding of disclosable conduct relating to the decision and decision-making process that led to appointing these individuals to positions at EL2 level. This is because it appears that relevant individuals were already employed by the agency at EL2 level. Sections 25 and 26 of the *Public Service Act 1999* and section 46 of the Australian Public Service Commissioner’s Directions 2002 allow for a person to be moved ‘at level’ or to be assigned different duties, i.e. a different role, at level. This provides agencies with the ability to move people into a different role, at level. In my view, it was open to the PID Investigator to not make a finding of disclosable conduct relating to the decision and decision-making process that led to existing substantive EL2 staff being moved ‘at level’ to a different role at the same EL2 level.

#### Grounds of review in respect of the decision to terminate the Ombudsman’s investigation

[802] The complaint in respect of broadbanding had plainly been too subtle for Mr Anstey to follow; Mr Anstey has missed the point. Naturally, “arrangements the agency put in place for several appointees did not allow individuals appointed to the positions at EL2 level via an individual flexibility arrangement (IFA) to progress to the SES level without the need for an open, competitive selection process” because the National Judicial Registrar role had never been allocated an Executive Level 2 classification under **rule 9** of the *Public Service Classification Rules 2000* (Cth). I was not suggesting that an *explicit* broadbanding arrangement had been effected; it would be impossible to effect an explicit broadbanding arrangement where the National Judicial Registrar role had **never** been the subject of a role review, such that an Executive Level 2 classification was allocated to the National Judicial Registrar role pursuant to **rule 9** of the *Public Service Classification Rules 2000* (Cth).

[803] Rather, Ms McMullan’s conclusion that the National Judicial Registrar could bear both an Executive Level 2 and Senior Executive Band 1 classification on no basis other than the relative work load and complexity of the work undertaken would mean that Ms McMullan was suggesting that a **constructive** broadbanding arrangement across a Senior Executive Band classification were permissible, even though it is explicitly prohibited under rule 9(5) of the *Public Service Classification Rules 2000* (Cth). Of course, as has already been noted in part VIII of this review application, work load can never be a ground for allocating a particular classification to a group of duties and, by force of logic, can never be relevant to a broadbanding arrangement.

[804] The complaint about *constructive* broadbanding is ultimately a derivative issue and, as such, will not be pressed in the grounds of review.

[805] The complaint about constructive broadbanding is derivative because it presupposes that the National Judicial Registrar role was the subject of a role re-evaluation (i.e. a role review) such that, following a lawful review, an Executive Level 2 classification was allocated to the National Judicial Registrar role, for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth), on the basis that “*the NJR positions could be held at the SESB1 level in some registrars (sic), and at the Legal 2 level in other registrars (sic)*’ due to an assessment about the differing volume and complexity of work in each registry.”

[806] While it is difficult to prove a negative, I will demonstrate that there never was a role review and, as such, there was no evidentiary basis for finding that “*the NJR positions could be held at the SESB1 level in some registrars (sic), and at the Legal 2 level in other registrars (sic)*’ due to an assessment about the differing volume and complexity of work in each registry.”

[807] My grounds of review are as follows:

1) Mr Anstey’s claim that “[t]he APS Classification Guide *recommends* a role review or role evaluation be carried out in certain circumstances ...” is false;

2) Mr Anstey’s claim that “[c]onducting and documenting a role review is not set down in legislation” is stunted and misinformed because the legal obligation to conduct and document a role review is legislatively mandated;

3) Mr Anstey’s claim that “ultimately it is at the discretion of the Agency Head to determine the duties of an employee and determine an appropriate classification based on those duties” is false;

4) Mr Anstey’s claim that “[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented” is unjustifiable;

5) The fact that Mr Anstey was unperturbed by Ms McMullan’s finding that a “decision to reclassify these positions was made *on the basis of the relative volume and complexity of work undertaken in the various registrars (sic)*” demonstrates a failure on Mr Anstey’s part to understand how classification decisions are to be made;

6) Mr Anstey’s claim that “it was reasonably open to the PID Investigator to not make a finding of disclosable conduct relating to the decision and decision-making process that led to appointing these individuals to positions at EL2 level ... because it appears that relevant individuals were already employed by the agency at EL2 level” is false;

7) Mr Anstey’s claims about the “SES cap” are, in the light of the evidence, misinformed;

8) Mr Anstey’s claim that “[s]ections 25 and 26 of the *Public Service Act 1999* and section 46 of the Australian Public Service Commissioner’s Directions 2022 allow for a person to be moved ‘at level’ or to be assigned different duties, i.e. a different role, at level” is irrelevant and incorrect; and

9) Mr Anstey’s failure to address Ms McMullan’s failure to investigate the allegation that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they engaged Matthew Benter to fill an Executive Level 2 role for which there had been no role evaluation, and for which there was no merit based selection process.

### *Ground 1*

[808] I adopt the reasoning in paragraphs [292] – [301].

### *Ground 2*

[809] I adopt the reasoning in paragraphs [302] – [314].

### *Ground 3*

[810] I adopt the reasoning in paragraphs [315] – [318].

#### *Ground 4*

[811] Mr Anstey’s claim that “[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented” is unjustifiable.

[812] I repeatedly noted, in the complaint lodged with the Office of the Commonwealth Ombudsman on 26 October 2021, that there was no evidence before Ms McMullan that a role review of the National Judicial Registrar role had ever been conducted, such that the National Judicial Registrar role was allocated an Executive Level 2 classification for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth), and that Ms McMullan’s claims that a role review of the National Judicial Registrar role was not based on any cogent or probative evidence. [762](#)

[813] Acknowledging the challenge of proving a negative, I will demonstrate how Ms McMullan’s claim that a role review of the National Judicial Registrar role had been undertaken, and how Mr Anstey’s claim that “[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented”, were based on the false premise that there is evidence that a role review had been conducted.

[814] While neither Ms McMullan (in contravention of her duties under subsection 51(3) of the *Public Interest Disclosure Act 2013* (Cth) and section 13 of the *Public Interest Disclosure Standard 2013* (Cth)) nor Mr Anstey identified the item of evidence that Mr Anstey claimed was the Agency Head’s documented decision that “it was appropriate and necessary for some positions to be held at EL2 level”, decision makers in the Australian Public Service Commission has provided a publicly accessible clue.

A. The Australian Public Service Commission’s claims about documents supporting the finding that “a role review process ... had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load”

[815] I adopt the reasoning in paragraph [632] of this email.

B. Assessment of the relevance of the “Email correspondence between Commission and Federal Court of Australia titled ‘PRIVATE AND CONFIDENTIAL’ dated 27 October 2020” to Mr Anstey’s claim that “[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented”

[816] I adopt the reasoning in paragraphs [633] – [639] of this email.

C. Assessment of the relevance of the “Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia” to Mr Anstey’s claim that “[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented”

[817] This leads to the second document that Ms Strangio identified as being a document (including classification assessments, broadbanding proposals etc) that was provided to Kate McMullan of the Australian Public Service Commission that supports her finding that allegations of impropriety and, presumably, unlawful conduct in the context of the recruitment of National Judicial Registrars were unsubstantiated because there had been “a role review process that had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load.”

[818] Ms Strangio claimed that the “Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia” supports Ms McMullan’s finding that allegations of impropriety and, presumably, unlawful conduct in the context of the recruitment of National Judicial Registrars were unsubstantiated because there had been “a role review process that had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load.”

[819] The *Judicial Registrar Recruitment* document is an eight page document. [763](#)

[820] The document commences as follows: [764](#)

Further to my memorandum of 22 August 2018 regarding the registrar recruitment exercise, this paper provides a further update on the recruitment exercise and recommendations endorsed by the recruitment panel for the appointment of candidates to the Senior National Judicial Registrar (SES2), National Judicial Registrar & District Registrar - VIC, QLD and WA (SES1), Judicial Registrar & District Registrar - TAS (Legal 2) and National Judicial Registrar – Native Title (SES1) positions, subject to your consideration and approval.

[821] Among other things, the author of the document sets out, in a table commencing on page 4, Federal Court registrar roles for which recruitment processes had been undertaken, identifies the classifications allocated to the roles under **rule 9** of the *Public Service Classification Rules 2000* (Cth), and identifies the candidates selected by the selection committees for the relevant registrar roles in the Federal Court.

[822] One of the roles identified in the table is the “National Judicial Registrar & District Registrar – QLD Registry (SES1).”<sup>765</sup> I note that the National Judicial Registrar & District Registrar role is the Queensland District Registry of the Federal Court bears a Senior Executive Band 1 classification.<sup>766</sup>

[823] The names of three lead candidates are set out in the column next to the position, and comments are set out in relation to the lead candidates in a column next to their names.<sup>767</sup> The name of the candidate selected by the selection committee consisting of Sia Lagos, David Pringle and Andrea Jarratt to fill the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role is the Queensland District Registry of the Federal Court is Murray Belcher.<sup>768</sup> Kerryn Vine-Camp, the Australian Public Service Commissioner’s representative for the purposes of the selection process for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy, certified that she had been a full participant in the selection process, and that the selection process complied with subsection 10A(2) of the *Public Service Act 1999* (Cth) and the *Australian Public Service Commissioner’s Directions 2016* (Cth).<sup>769</sup>

[824] In the column next to Mr Belcher’s name is the following typed comment:<sup>770</sup>

Appoint to position subject to Murray’s existing Judicial Registrar (Legal 2) position not backfilled.

Refer to Greenwood J memorandum

[825] Next to the typed comment is a handwritten note – “No SES”.<sup>771</sup>

[826] Another one of the roles identified in the table is the “National Judicial Registrar & District Registrar – VIC Registry (SES1).”<sup>772</sup> I note that the National Judicial Registrar & District Registrar role is the Victoria District Registry of the Federal Court bears a Senior Executive Band 1 classification in the table.<sup>773</sup>

[827] The names of four lead candidates are set out in the column next to the position, and comments are set out in relation to four candidates in a column next to their names.<sup>774</sup> The name of the candidate selected by the selection committee consisting of Sia Lagos, David Pringle and Andrea Jarratt to fill the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role is the Victoria District Registry of the Federal Court is Tim Luxton.<sup>775</sup> Kerryn Vine-Camp, the Australian Public Service Commissioner’s representative for the purposes of the selection process for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in the Victoria District Registry, certified that she had been a full participant in the selection process, and that the selection process complied with subsection 10A(2) of the *Public Service Act 1999* (Cth) and the *Australian Public Service Commissioner’s Directions 2016* (Cth).<sup>776</sup>

[828] The third of the roles identified in the table is the “National Judicial Registrar & District Registrar – WA Registry (SES1).”<sup>777</sup> I note that the National Judicial Registrar & District Registrar role is the Western Australia District Registry of the Federal Court bears a Senior Executive Band 1 classification in the table.<sup>778</sup>

[829] The names of three lead candidates are set out in the column next to the position, and comments are set out in relation to the lead candidates in a column next to their names.<sup>779</sup> The name of the candidate selected by the selection committee consisting of Sia Lagos, David Pringle and Andrea Jarratt to fill the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role is the Western Australia District Registry of the Federal Court is Russell Trott.<sup>780</sup> Kerryn Vine-Camp, the Australian Public Service Commissioner’s representative for the purposes of the selection process for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in the Western Australia District Registry, certified that she had been a full participant in the selection process, and that the selection process complied with subsection 10A(2) of the *Public Service Act 1999* (Cth) and the *Australian Public Service Commissioner’s Directions 2016* (Cth).<sup>781</sup>

[830] In the column next to Mr Trott’s name is the following typed comment: <sup>782</sup>

Appoint to position.

Russell’s existing Judicial Registrar (Legal 2) position: backfill with Matthew Benter.

[831] Next to the typed comment is a handwritten note – “No SES BUT DR IFA”. [783](#)

[832] One of the unsuccessful candidates for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in the Western Australia District Registry was Matthew Benter. [784](#)

[833] In the column next to Mr Benter’s name is the following typed comment: [785](#)

Appoint to backfill vacancy Judicial Registrar – Legal 2 position (WA), previously Russell Trott’s role. Would require allowance equivalent to SES1. Expected: it is expected that a component of this would be covered by the budget from Elizabeth Stanley’s position (retiring – 4 December 2018).

[834] Next to the typed comment is a handwritten note – “OK”. [786](#)

[835] I draw your attention to the fact that Mr Benter was to “backfill” a “Judicial Registrar – Legal 2 position (Melb)”, which was “***previously*** Russell Trott’s role.” [787](#) There is no mention whatever of an Executive Level 2 classified National Judicial Registrar role in the *Judicial Registrar Recruitment* document. Nor is there any mention of Matthew Benter being engaged to fill an Executive Level 2 classified National Judicial Registrar role in the *Judicial Registrar Recruitment* document. Finally, it is apparent that Matthew Benter would be “backfilling” a Judicial Registrar role (not a National Judicial Registrar role) previously held by Russell Trott, because Russell Trott had been selected for promotion to fill the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in the Western Australia District Registry of the Federal Court of Australia. One cannot “backfill” a National Judicial Registrar role held by Russell Trott because Russell Trott never held an Executive Level 2 classified National Judicial Registrar role. You would think this would all be very obvious to somebody who had investigated the allegations properly.

[836] On the eighth page of the document is a handwritten note, which reads:

Sia

Changes to be managed within 17/18 NOR appropriation. Proposed recruitment approved subject to me seeing & approving reconciliation of costs against budget by Finance Dept (Kat Hunter & Catherine Sullivan).

SES positions WA & QLD not to be filled – positions to be transferred to Sydney – WA & QLD DRs to be filled at Legal 2 with allowance (IFAs) if possible.

[837] The document was signed by Warwick Soden and dated “25/9/18”.

[838] I now proceed to demonstrate why Mr Anstey’s claim that “[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented” is unjustified.

[839] It has already been established that:

a) under the *Public Service Act 1999* (Cth), the Commissioner’s functions include strengthening the professionalism of the Australian Public Service and facilitating continuous improvement in workforce management;<sup>788</sup> upholding high standards of integrity and conduct in the Australian Public Service;<sup>789</sup> developing, reviewing and evaluating workforce management policies and practices;<sup>790</sup> and doing anything incidental to or conducive to the performance of the Commissioner’s functions;<sup>791</sup> and

b) the *Australian Public Service Classification Guide* sources its existence in the legislated functions of the Australian Public Service Commissioner;

c) the *Australian Public Service Classification Guide* provides that “[t]horough information and documentation procedures in relation to classification decisions are necessary elements in safeguarding the integrity of the process;”<sup>792</sup> “[a] decision to allocate a new or revised classification level to a job is made under delegated authority under the *Public Service Act 1999* and the *Public Service Classification Rules 2000*”, and that “[t]his means that a record of decision **must** be made, including the reasons for the decision”;<sup>793</sup> documenting reasons for the classification decision is **necessary** to safeguard the integrity and transparency of the decision outcome;<sup>794</sup> in the context of documenting classification decisions, “a record **must** be kept of decisions made when exercising authority under the [Public Service] Act or the Classification Rules”;<sup>795</sup> and

d) the instructions contained in the *Australian Public Service Classification Guide* are communicated in mandatory language; and

e) in essence, there is no discretion on the part of an Agency Head, or his or her delegate, to refuse to gather evidence in a structured and systematic way to understand the role; or to refuse to conduct an assessment against established criteria, including the work level standards, because “[t]he allocation of an APS Level classification, Executive Level classification or SES classification **must** be based on the work value of the group of duties **described in the work level standards for that classification**, issued in writing, by the Commissioner”; or to fail to maintain documentary records of the decision by which a classification is allocated to a role, as well as the reasons for that decision; and

f) Agency Heads,<sup>796</sup> Statutory Office Holders,<sup>797</sup> and APS employees are legally obligated to, at all times, behave in a way that upholds the APS Values,<sup>798</sup> which includes acting in a way that is right and proper, as well as technically and legally correct or preferable;<sup>799</sup> and

g) it cannot be contended that it is ever right and proper, as well as technically and legally correct or preferable to dismiss the mandatory instructions of the Australian Public Service Commissioner and conduct a role evaluation with a view to allocating a classification where a) evidence is not gathered in a structured and systematic way to understand the role; b) the role is not assessed and measured against established criteria, including the work level standards, particularly because rule 9(2A) of the *Public Service Classification Rules 2000* (Cth) requires that “[t]he allocation of an APS Level classification, Executive Level classification or SES classification **must** be based on the work value of the group of duties **described in the work level standards for that classification**, issued in writing, by the Commissioner”; and c) documentary records of the decision by which a classification is allocated to a role, as well as the reasons for that decision, are not properly documented.

[840] First and plainly, nothing in the *Judicial Registrar Recruitment* document even comes close to supporting the view that a role review of the National Judicial Registrar role had been conducted such that an Executive Level 2 classification had been to the groups of duties for that role based on the work value described in the work level standards for that classification.

[841] Second, it has already been established that:

a) role evaluation records prepared between 1 January 2017 and 31 December 2020, that show that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar roles in Queensland and Western Australia were, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated Executive Level 2 classifications for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth) do not exist;<sup>800</sup> and

b) Mr Soden's (the Agency Head's) comments "WA & QLD DRs to be filled at Legal 2 with allowance (IFAs) if possible" on the eighth page of the *Judicial Registrar Recruitment* document [801](#) could not possibly relate to the allocation of Executive Level 2 (i.e. Legal 2) classifications to the groups of duties for the National Judicial Registrar & District Registrar roles in Queensland and Western Australia because consideration of an independent flexibility arrangement or its use is of no relevance to the allocation of an approved classification, under **rule 9** of the *Public Service Classification Rules 2000* (Cth), to each group of duties to be performed in any agency, and, as such, the comments are actually about the allocation of Executive Level 2 (i.e. Legal 2) classifications to Murray Belcher and Russell Trott pursuant to **rule 6** of the *Public Service Classification Rules 2000* (Cth); and

c) Mr Soden's statement that the SES "positions [are] to be transferred to Sydney" could not possibly mean that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar roles in the Queensland and Western Australia District Registries would be transferred to Sydney because a District Registrar is, by law, required to be located in the District Registry of the relevant State, [802](#) and that, rather, and was actually the case, the classification that would have been allocated to District Registrars were, under **rule 6** of the *Public Service Classification Rules 2000* (Cth), allocated (or, as happened in one case, proposed to be allocated) to people based in Sydney (i.e. Susan O'Connor and Drew Pearson). [803](#)

[842] The most and best that can be said of Mr Anstey's finding that "the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented" is that Mr Soden had, in the absence of a lawful role review for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar roles in the Queensland and Western Australia District Registries, decided to allocate Executive Level 2 (i.e. Legal 2) classifications to Murray Belcher and Russell Trott under **rule 6** of the *Public Service Classification Rules 2000* (Cth).

[843] In the proven absence of any documentary evidence of role evaluation records, prepared between 1 January 2017 and 31 December 2020, which show that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar roles in Queensland and Western Australia were, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated Executive Level 2 classifications for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth), [804](#) Mr Anstey's finding that the Agency Head's decision to allocate Executive Level 2 classifications to Murray Belcher and Russell Trott under **rule 6** of the *Public Service Classification Rules 2000* (Cth) made it "reasonably open" for "the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented" is absurd. It is the mark of a very confused and ill-informed mind. It is the mark of a person who has a pathetic command of the law. It is the mark of a person who would dismiss the explicit legislative requirement that findings of fact made by a public interest disclosure investigator be based on logically probative evidence, [805](#) and that the evidence relied on in the investigation be relevant. [806](#) It is the mark of a person with zero forensic aptitude (even though his role is to conduct investigations). Indeed, it is the mark of an incompetent (or archtypal?) public servant.

[844] It therefore follows that the “Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia” cannot reasonably be relied on by Mr Anstey’s claim that “[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a [role] review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented.”

[845] At this point, it is worth noting that even Charmaine Sims, the General Counsel of the Australian Public Service Commission, has had trouble justifying how it is that the “Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia” supports Kate McMullan’s finding that allegations of impropriety and, presumably, unlawful conduct in the context of the recruitment of National Judicial Registrars were unsubstantiated because there had been “a role review process that had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load.”

[846] According to submissions provided to the Office of the Australian Information Commissioner on 3 November 2022, Charmaine Sims states: [807](#)

Document 2 (Judicial Registrar Recruitment Outcome) was prepared by the Federal Court in the context of a recruitment process and was provided to Ms McMullan during the course of a PID investigation. The Commission acknowledges the primary purpose of the document is not for a role review. However, in the Commission’s view, this document provides the elements required at a high level for a role review **to be** conducted.

[847] No supporting reasons are provided to support Ms Sims’ assertion that “in the Commission’s view, [the Judicial Registrar Recruitment Outcome] document provides the elements required at a high level for a role review **to be** conducted.” Nor is there any evidence that the “role review” was **actually** conducted. On the contrary, a freedom of information decision maker in the Federal Court of Australia has, in response to a request for the role evaluation records prepared between 1 January 2017 and 31 December 2020, that show that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar roles in Queensland and Western Australia were, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated Executive Level 2 classifications for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth), [808](#) explicitly refused to provide access to those documents because they do not exist or cannot be found. [809](#)

[848] I doubt the Information Commissioner will be quite as confused and ill-informed as Mark Anstey has been when the time comes to assess whether the *Judicial Registrar Recruitment* document is a document “that support[s] acting assistant commissioner Kate McMullan’s conclusion that, in relation to the ‘National Judicial Registrar role’, ‘a role review process ... had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load.’”

D. Public concessions made by decision makers in the Federal Court of Australia about “role reviews” conducted in respect of the National Judicial Registrar role

[849] As has already been noted, an access applicant applied, under the *Freedom of Information Act 1982* (Cth), to the Australian Public Service Commission for access to “any and all documents (including but not limited to classification evaluation documents prepared for the ‘Legal 2’ and ‘SES1’ classification level registrar positions referred to in an Australian article published on 9 February 2022 titled Federal Court boss warned on job rule sidestep) that support acting assistant commissioner Kate McMullan’s conclusion that, in relation to the ‘National Judicial Registrar role’, ‘a role review process ... had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load” [810](#) and Giorgina Strangio claimed that there were two documents that met the terms of that access request: a) the “Email correspondence between Commission and Federal Court of Australia titled ‘PRIVATE AND CONFIDENTIAL’ dated 27 October 2020”; and b) the “Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia.” [811](#) Ms Strangio refused to grant access to the documents on public interest grounds. [812](#)

[850] I now turn to several freedom of information decisions that outright contradict the freedom of information decisions that were made by decision makers in the Australian Public Service Commission about the existence of documents supporting Kate McMullan’s finding that “allegations of impropriety and, presumably, unlawful conduct in the context of the recruitment of National Judicial Registrars were unsubstantiated because there had been ‘a role review process that had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load.’”

[851] First, a near identically worded freedom of information request was also addressed to the Federal Court of Australia.

[852] On 20 March 2022, an access applicant applied to the Federal Court of Australia for access to “any and all documents (including but not limited to classification evaluation documents prepared for the ‘Legal 2’ and ‘SES1’ classification level registrar positions referred to in an Australian article published on 9 February 2022 titled Federal Court boss warned on job rule sidestep) that support acting assistant commissioner Kate McMullan’s conclusion that, in relation to the ‘National Judicial Registrar role’, ‘a role review process ... had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load.’” [813](#)

[853] On 20 June 2022, Nicola Colbran, National Judicial Registrar & District Registrar of the South Australia District Registry, and an authorised decision maker for the Federal Court of Australia under the *Freedom of Information Act 1982* (Cth), set aside Registrar Claire Hammerton Cole’s initial decision [814](#) and, on internal review, refused to provide access to the requested documents

pursuant to section 24A of the *Freedom of Information Act 1982* (Cth) because “the documents cannot be found or do not exist.” [815](#)

[854] Ms Colbran, the most senior Federal Court registrar in South Australia, who regularly exercises the judicial power of the Commonwealth under direction and, as such, knows a thing or two about logically probative evidence and relevant evidence, was unconvinced that there were any documents in the possession of the Federal Court of Australia that in any way “support acting assistant commissioner Kate McMullan’s conclusion that, in relation to the ‘National Judicial Registrar role’, ‘a role review process ... had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load.’” Ms Colbran explicitly stated that the documents being sought, which were “1. documents that were provided to Kate McMullan; and 2. are evidence that ‘a role review process that had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load’” did not exist. [816](#)

[855] It cannot both be the case that, as decision makers in the Australian Public Service Commission have contended, two documents, both of which find their provenance in the Federal Court of Australia, support Kate McMullan’s finding that “in relation to the ‘National Judicial Registrar role’, ‘a role review process ... had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load’” and that, as the most senior Federal Court registrar in South Australia stated, the Federal Court has no documents that support Kate McMullan’s finding that “in relation to the ‘National Judicial Registrar role’, ‘a role review process ... had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load.’” Either the documents exist, or they do not.

[856] Second, in response to a freedom of information request submitted to the Federal Court of Australia on 26 February 2022 for access to “i. documents recording the ‘role review processes’ that Kate McMullan based her conclusions on [and] ii. documents setting out the classification assessments for the Legal 2 and SES1 versions of the National Judicial Registrar role that Kate McMullan would presumably have referred to when drawing her conclusions ...” [817](#) National Judicial Registrar & District Registrar Nicola Colbran, a woman who knows a thing or two about logically probative evidence and relevant evidence, refused, pursuant to section 24A of the *Freedom of Information Act 1982* (Cth), to provide access to the requested documents because no such documents existed or could be found. [818](#)

[857] Third, freedom of information decision makers in the Federal Court of Australia have consistently refused to provide access to “the classification evaluation for the National Judicial Registrar role that Matthew Benter applied for and succeeded in being selected to fill” [819](#) under section 24A of the *Freedom of Information Act 1982* (Cth) because the document does not exist / cannot be found. [820](#) The original decision maker, Claire Hammerton Cole, noted in her decision dated 6 June 2022: [821](#)

As there are no documents to provide to you, I have decided to refuse access to the classification evaluations requested ... under subsection 24A of the FOI Act.

[858] On internal review, the reviewing officer, National Judicial Registrar & District Registrar Nicola Colbran, a woman who knows a thing or two about logically probative evidence and relevant evidence, affirmed Claire Hammerton Cole's decision that "the classification evaluation for the National Judicial Registrar role that Matthew Benter applied for and succeeded in being selected to fill" did not exist or could not be found. [822](#)

[859] Fourth, and most telling, in response to a freedom of information request for "access to the role evaluation records, prepared between 1 January 2017 and 31 December 2020, that show that the SES Band 1 classified National Judicial Registrar role in the Federal Court was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the Public Service Classification Rules 2000", [823](#) an authorised officer in the Federal Court refused to grant access to role evaluation records because they do not exist or cannot be found. [824](#)

[860] The upshot? Authorised decision makers in the Federal Court of Australia have consistently, publicly, unequivocally and unambiguously conceded the humiliating truth that there is no documentary evidence of a role evaluation record (or role review record) that shows that the National Judicial Registrar role in the Federal Court was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of **rule 9** of the *Public Service Classification Rules 2000* (Cth). Yet Mark Anstey claims "[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented." [825](#) Go figure.

E. Conclusions about Mark Anstey's finding that "[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented"

[861] I have shown that:

a) the General Counsel in the Australian Public Service Commission has sheepishly conceded, in response to a request for further information from the Office of the Australian Information

Commissioner, that the *Judicial Registrar Recruitment Outcome* document, which was provided to the Office of the Commonwealth Ombudsman on 26 October 2021 in the form of Annexure EDR – 93, is not evidence of “a role review process that had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load”,<sup>826</sup> even though the Australian Public Service Commission originally tried to pass off that document as evidence of “a role review process that had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load”,<sup>827</sup>

b) Nicola Colbran, the most senior Federal Court registrar in South Australia, has publicly conceded the humiliating fact that there are no documents in the possession of the Federal Court of Australia demonstrating “in relation to the ‘National Judicial Registrar role’, ‘a role review process ... had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load’”;<sup>828</sup>

c) two registrars of the Federal Court of Australia have publicly conceded the humiliating fact that “the classification evaluation for the National Judicial Registrar role that Matthew Benter applied for and succeeded in being selected to fill”<sup>829</sup> do not exist or cannot be found;<sup>830</sup>

d) B Henderson, an authorised decision maker for the purposes of the *Freedom of Information Act 1982* (Cth), has publicly conceded the humiliating fact that the “role evaluation records, prepared between 1 January 2017 and 31 December 2020, that show that the SES Band 1 classified National Judicial Registrar & District Registrar role in Queensland was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the Public Service Classification Rules 2000” do not exist;<sup>831</sup>

e) B Henderson, an authorised decision maker for the purposes of the *Freedom of Information Act 1982* (Cth), has publicly conceded the humiliating fact that the “role evaluation records, prepared between 1 January 2017 and 31 December 2020, that show that the SES Band 1 classified National Judicial Registrar & District Registrar role in Western Australia was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the Public Service Classification Rules 2000” do not exist;<sup>832</sup> and

f) B Henderson, an authorised decision maker for the purposes of the *Freedom of Information Act 1982* (Cth), has publicly conceded the humiliating fact that the “the role evaluation records, prepared between 1 January 2017 and 31 December 2020, that show that the SES Band 1 classified National Judicial Registrar role in the Federal Court was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an

Executive Level 2 classification for the purposes of rule 9 of the Public Service Classification Rules 2000” do not exist. [833](#)

[862] Thus, I have demonstrated that, contrary to Kate McMullan’s finding, there is no evidence of “a role review process that had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load.” [834](#) Of course, that is to say nothing of the impermissibility of classifying or reclassifying a role on the basis of the “work load” of the role, which is a patent error that Mark Anstey refused to engage with. [835](#)

[863] Now, putting to one side the impermissibility of classifying or reclassifying a role on the basis of the “work load” of that role, in order to support Kate McMullan’s finding that “allegations of impropriety and, presumably, unlawful conduct in the context of the recruitment of National Judicial Registrars were unsubstantiated because there had been ‘a role review process that had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load’”, Kate McMullan was required, pursuant to subsection 12(1) of the *Public Interest Disclosure Standard 2013* (Cth), to base her finding of fact on logically probative evidence.

[864] Naturally, notations made by the Agency Head on the “Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia” [836](#) that Murray Belcher and Russell Trott were to be allocated Executive Level 2 (i.e. Legal 2) classifications pursuant to **rule 6** of the *Public Service Classification Rules 2000* (Cth) so that the Senior Executive Band 1 classifications that they were entitled to be allocated under **rule 6** (because both had, on their merits, been selected for promotion to Senior Executive Band 1 classification National Judicial Registrar & District Registrar roles) could be “transferred” to Sydney so that Susan O’Connor and Drew Pearson, candidates who had not applied for any Senior Executive Band 1 classified National Judicial Registrar vacancies, could be allocated those Senior Executive Band 1 classifications pursuant to **rule 6** are not **logically probative** of the fact that ‘a role review process [resulting] in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load.’”

[865] In order for the notation to be logically probative, the notations would, pursuant to **rule 9** of the *Public Service Classification Rules 2000* (Cth), have to, or have to tend to, logically prove the existence or non-existence of: [837](#)

a) the allocation of an approved classification to the groups of duties to be performed by the National Judicial Registrars & District Registrars in the Queensland and Western Australia District Registries; [838](#) and

b) the allocation of an Executive Level 2 classification to the group of duties based on the work value of the group of duties described in the work level standards for the Executive Level 2 classification, issued, in writing, by the Australian Public Service Commissioner. [839](#)

[866] The notations prove the existence of the Agency Head's intention to allocate of approved classifications to Murray Belcher and Russell Trott, APS employees, under **rule 6** of the *Public Service Classification Rules 2000* (Cth). The notations do not prove, or tend to prove:

a) the allocation of an approved classification to the groups of duties to be performed by the National Judicial Registrars & District Registrars in the Queensland and Western Australia District Registries; [840](#) and

b) the allocation of an Executive Level 2 classification to the group of duties based on the work value of the group of duties described in the work level standards for the Executive Level 2 classification, issued, in writing, by the Australian Public Service Commissioner. [841](#)

[867] Therefore, the notations are not **logically probative** of the allocation of an approved classification (in this case, the allocation of Executive Level 2 classifications to the groups of duties for the National Judicial Registrar & District Registrar roles in the Queensland and Western Australia District Registries of the Federal Court of Australia) to the groups of duties to be performed for the National Judicial Registrar & District Registrar roles in the Queensland and Western Australia District Registries of the Federal Court of Australia.

[868] More to the point, in no universe is it possible for a person to conclude that, because the Agency Head recorded hand written notations on the "Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia" document that Murray Belcher and Russell Trott were to be allocated Executive Level 2 (i.e. Legal 2) classifications for the purposes of **rule 6** of the *Public Service Classification Rules 2000* (Cth) so that the Senior Executive Band 1 classifications that they were entitled to on their merits could be "transferred" to Sydney so that Susan O'Connor and Drew Pearson, two candidates who had not applied for the Senior Executive Band 1 classified National Judicial Registrar roles in Sydney (because those vacancies were never notified in the Public Service Gazette) [842](#) would receive those Senior Executive Band 1 classifications, a "role review process" was undertaken such that the Senior Executive Band 1 classified National Judicial Registrar role (a role that was separate and distinct to the National Judicial Registrar & **District Registrar** roles) was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth).

[869] So that the point is not lost on the Ombudsman's finest, a notation on the "Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia" that an Executive Level 2 (i.e. Legal 2) classification is to be allocated to Murray Belcher, pursuant to **rule 6** of the *Public Service Classification Rules 2000* (Cth), does not prove the fact, or does not tend to prove the fact, that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Queensland was the subject of a "role review", such that the role was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of **rule 9** of the *Public Service Classification Rules 2000* (Cth).

[870] All that the notation proves is that the Agency Head proposed to allocate an Executive Level 2 (i.e. Legal 2) classification to Murray Belcher, pursuant to rule 6 of the *Public Service Classification Rules 2000* (Cth), so that the Senior Executive Band 1 classification that would rightfully have been allocated to Murray Belcher under rule 6 of the *Public Service Classification Rules 2000* (Cth) could be transferred to Sydney to be allocated to either one of Susan O'Connor or Drew Pearson.

[871] Thus, the notation does not logically prove, or even tend to prove, that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Queensland was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth) (i.e. was the subject of a role review). Moreover, the notation, being a notation about the allocation of an Executive Level 2 (i.e. Legal 2) classification to Murray Belcher does not make the existence of the fact that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Queensland was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth) more probable or less probable than it would be without the evidence of the notation that Murray Belcher was to be allocated an Executive Level 2 classification for the purposes of rule 6 of the *Public Service Classification Rules 2000* (Cth).

[872] So that the point is not lost on the Ombudsman's finest, a notation on the "Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia" that an Executive Level 2 (i.e. Legal 2) classification is to be allocated to Russell Trott, pursuant to **rule 6** of the *Public Service Classification Rules 2000* (Cth), does not prove the fact, or does not tend to prove the fact, that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Western Australia was the subject of a "role review", such that the role was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of **rule 9** of the *Public Service Classification Rules 2000* (Cth).

[873] All that the notation proves is that the Agency Head proposed to allocate an Executive Level 2 (i.e. Legal 2) classification to Russell Trott, pursuant to rule 6 of the *Public Service Classification Rules 2000* (Cth), so that the Senior Executive Band 1 classification that would rightfully have been allocated to Murray Belcher under rule 6 of the *Public Service Classification Rules 2000* (Cth) could

be transferred to Sydney to be allocated to either one of Susan O'Connor or Drew Pearson. Thus, the notation does not logically prove, or even tend to prove, that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Western Australia was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth) (i.e. was the subject of a role review).

[874] Moreover, the notation, being a notation about the allocation of an Executive Level 2 (i.e. Legal 2) classification to Russell Trott does not make the existence of the fact that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Western Australia was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth) more probable or less probable than it would be without the evidence of the notation that Russell Trott was to be allocated an Executive Level 2 classification for the purposes of rule 6 of the *Public Service Classification Rules 2000* (Cth).

[875] So that the point is not lost on the Ombudsman's finest, notations left by the Agency Head on the "Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia" to allocate Executive Level 2 (i.e. Legal 2) classifications to Murray Belcher and Russell Trott, pursuant to rule 6 of the *Public Service Classification Rules 2000* (Cth), are not logically probative of, or relevant to, a finding that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar roles in Queensland and Western Australia were, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated Executive Level 2 classifications for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth).

[876] **Still less**, notations left by the Agency Head on the "Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia" to allocate Executive Level 2 (i.e. Legal 2) classifications to Murray Belcher and Russell Trott, pursuant to **rule 6** of the *Public Service Classification Rules 2000* (Cth), are not logically probative of the finding that the Senior Executive Band 1 National Judicial Registrar role, which neither Murray Belcher nor Russell Trott applied for, and which was never publicly notified in the Public Service Gazette, [843](#) and **which is an altogether different to the Senior Executive Band 1 classified National Judicial Registrar & District Registrar roles in Queensland and Western Australia because it has nothing to do with the essential District Registrar role in one of the District Registries of the Federal Court of Australia**, [844](#) was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated Executive Level 2 classifications for the purposes of **rule 9** of the *Public Service Classification Rules 2000* (Cth) (i.e. a role review).

[877] But so far as Mark Anstey is concerned, a notation left by the Agency Head on the "Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia" proposing to allocate Executive Level 2 classifications to Murray Belcher and Russell Trott is proof positive that the Senior Executive Band 1 classified National Judicial Registrar role, **which is entirely**

***different and distinct to the National Judicial Registrar & District Registrar roles in Queensland and Western Australia*** (distinct because the Chief Executive Officer is obligated, under section 34(3) of the *Federal Court of Australia Act 1976* (Cth), to ensure that there is a District Registrar resident in each State of the Federation, and because the National Judicial Registrar role is entirely discretionary and not the District Registrar of District Registry of the Federal Court), was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of **rule 9** of the *Public Service Classification Rules 2000* (Cth) (i.e. the subject of a “role review”).

[878] Mark Anstey’s reasoning is manifestly absurd; it is sheer idiocy.

[879] There is no logically probative or relevant evidence [845](#) that demonstrates that the Senior Executive Band 1 classified National Judicial Registrar role, which is entirely different and distinct to the National Judicial Registrar & District Registrar roles in Queensland and Western Australia was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, ever reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the Public Service Classification Rules 2000. Freedom of information decision makers in the Federal Court of Australia have, publicly and beyond a shadow of a doubt, put that to rest.

[880] Even the Australian Public Service Commission’s General Counsel acknowledges that the “Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia”, which is the only document that bears written notes recorded by the Agency Head of the Federal Court of Australia Statutory Agency, is not a role review document. [846](#)

[881] Despite all of what has been demonstrated, Mark Anstey insists that “[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented.” Moreover, he refuses to identify the “documented” item of evidence which he relies on to conclude that it was “reasonably open to the PID Investigator to have concluded that there was a review conducted.”

[882] ***There never was a role review of the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Queensland.***

[883] ***There never was a role review of the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Western Australia.***

[884] ***There never was a role review of the Senior Executive Band 1 National Judicial Registrar role in the Federal Court.***

[885] ***There is no documented decision on the part of the Agency Head that “it was appropriate and necessary for some positions to be held at EL2 level.”***

[886] There is only a documented notation, left by the Agency Head on the “Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia”, that Murray Belcher and Russell Trott were to be unlawfully allocated Executive Level 2 (i.e. Legal 2) classifications, pursuant to **rule 6** of the *Public Service Classification Rules 2000* (Cth), so that the Senior Executive Band 1 classifications that they should have been allocated, having been selected for promotion to the Senior Executive Band 1 National Judicial Registrar & District Registrar roles on their merits, could be “transferred” to Sydney and allocated to Susan O’Connor and Drew Pearson – two people who did not apply for the Senior Executive Band 1 National Judicial Registrar role (which was never notified in the Public Service Gazette, contrary to section 20 of the *Australian Public Service Commissioner’s Directions 2016* (Cth)) – pursuant to rule 6 of the *Public Service Classification Rules 2000* (Cth).

[887] Mark Anstey’s finding that “[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented” is, for the reasons set out in excruciating detail for the Ombudsman’s finest, ***plainly wrong*** and, thus, unjustifiable.

#### *Ground 5*

[888] I adopt the reasoning in paragraphs [378] – [393].

#### *Ground 6*

[889] I challenge Mark Anstey’s finding that “it was reasonably open to the PID Investigator to not make a finding of disclosable conduct relating to the decision and decision-making process that led to appointing these individuals to positions at EL2 level ... because it appears that relevant individuals were already employed by the agency at EL2 level.”

[890] As noted above, Mr Anstey stated:

I understand you were also concerned that some individuals who applied for a position at SES level were subsequently appointed to positions at EL2 level. In my view, it was reasonably open to the PID Investigator to not make a finding of disclosable conduct relating to the decision and decision-making process that led to appointing these individuals to positions at EL2 level. This is because it appears that relevant individuals were already employed by the agency at EL2 level. Sections 25 and 26 of the *Public Service Act 1999* and section 46 of the Australian Public Service Commissioner's Directions 2002 allow for a person to be moved 'at level' or to be assigned different duties, i.e. a different role, at level. This provides agencies with the ability to move people into a different role, at level. In my view, it was open to the PID Investigator to not make a finding of disclosable conduct relating to the decision and decision-making process that led to existing substantive EL2 staff being moved 'at level' to a different role at the same EL2 level.

[891] Of the six people identified who were engaged as National Judicial Registrars (i.e. Phillip Allaway, Matthew Benter, Rupert Burns, Claire Gitsham, Susan O'Connor and Tuan Van Le) and allocated Executive Level 2 classifications pursuant to **rule 6** of the *Public Service Classification Rules 2000* (Cth), only three applied for Senior Executive Band 1 classified vacancies. Those three were Phillip Allaway, Matthew Benter and Claire Gitsham.

[892] Phillip Allaway applied for, <sup>847</sup>**and only applied for**, <sup>848</sup> the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in the Victoria District Registry of the Federal Court of Australia. Moreover, in response to a freedom of information request for access to "the job application submitted for the National Judicial Registrar role that Phillip Allaway was selected to fill", <sup>849</sup> National Judicial Registrar & District Registrar Nicola Colbran set aside Claire Hammerton Cole's original decision refusing to grant access to the application on public interest grounds and refused to grant access to the requested document on the ground that the document does not exist or cannot be found. <sup>850</sup> National Judicial Registrar & District Registrar Nicola Colbran also conceded, in response to a freedom of information request for access to "the vacancy notification for the National Judicial Registrar role that Phillip Allaway applied for and was selected to fill", <sup>851</sup> that no such vacancy notification existed. <sup>852</sup> Therefore, the most senior Federal Court registrar in South Australia has publicly and unsurprisingly conceded the humiliating facts that:

a) there is no documentary evidence of the existence of Phillip Allaway's application for the National Judicial Registrar role that was handed to him without a merit based selection process; <sup>853</sup> and

b) there is no documentary evidence of the existence of the vacancy notification published for the National Judicial Registrar role that Phillip Allaway was selected to fill.

[893] Phillip Allaway was shortlisted for an interview, [854](#) interviewed, [855](#) and was determined by the selection committee, which was made up of Sia Lagos, David Pringle and Andrea Jarratt, to be “not successful.”[856](#) Phillip Allaway was, at the time of the shortlisting and selection process, an internal candidate, being a “Judicial Registrar”. [857](#)

[894] Claire Gitsham, an **external candidate**, [858](#) applied for, [859](#) **and only applied for**, [860](#) the:

a) Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in the Victoria District Registry of the Federal Court of Australia; [861](#) and

b) Senior Executive Band 2 classified Senior National Judicial Registrar vacancy in the Federal Court of Australia. [862](#)

[895] Moreover, in response to a freedom of information request for access to “the job application submitted for the National Judicial Registrar role that Claire Gitsham was selected to fill”, [863](#) National Judicial Registrar & District Registrar Nicola Colbran set aside Claire Hammerton Cole’s original decision refusing to grant access to the application on public interest grounds and refused to grant access to the requested document on the ground that the document does not exist or cannot be found. [864](#) National Judicial Registrar & District Registrar Nicola Colbran also conceded, in response to a freedom of information request for access to “the vacancy notice for the National Judicial Registrar role, published in the Public Service Gazette or elsewhere, that Claire Gitsham applied for and succeeded in being selected to fill”, [865](#) that no such vacancy notification existed. [866](#) Therefore, the most senior Federal Court registrar in South Australian has publicly and unsurprisingly conceded the humiliating facts that:

a) there is no documentary evidence of the existence of Claire Gitsham’s application for the National Judicial Registrar role that was handed to her without a merit based selection process; [867](#) and

b) there is no documentary evidence of the existence of the vacancy notification published for the National Judicial Registrar role that was handed over to Claire Gitsham.

[896] Claire Gitsham was not shortlisted for interview for the Senior Executive Band 2 classified Senior National Judicial Registrar vacancy, [868](#) but was shortlisted for interview for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in the Victoria District Registry of the Federal Court. [869](#) Claire Gitsham was interviewed for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in the Victoria District

Registry, and was determined by the selection committee, which was made up of Sia Lagos, David Pringle and Andrea Jarratt, to not be the most meritorious candidate. <sup>870</sup> Nonetheless, the selection committee stated in the selection report for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in the Victoria District Registry that Claire Gitsham was “[r]ecommended for a different role in the NOR team.” <sup>871</sup>

[897] Matthew Benter, an **external candidate**, <sup>872</sup> applied for, <sup>873</sup> **and only applied for**, <sup>874</sup> the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in the Western Australia District Registry of the Federal Court of Australia. Moreover, in response to a freedom of information request for access to “the job application submitted for the National Judicial Registrar role that Matthew Benter was selected to fill”, <sup>875</sup> National Judicial Registrar & District Registrar Nicola Colbran set aside Claire Hammerton Cole’s original decision refusing to grant access to the application on public interest grounds and refused to grant access to the requested document on the ground that the document does not exist or cannot be found. <sup>876</sup> National Judicial Registrar & District Registrar Nicola Colbran also conceded, in response to a freedom of information request for access to “the vacancy notice for the National Judicial Registrar role, published in the Public Service Gazette or elsewhere, that Matthew Benter applied for and succeeded in being selected to fill”, <sup>877</sup> that no such vacancy notification existed. <sup>878</sup> Therefore, the most senior Federal Court registrar in South Australian has publicly and unsurprisingly conceded the humiliating facts that:

a) there is no documentary evidence of the existence of Matthew Benter’s application for the National Judicial Registrar role that was handed to him without a merit based selection process; <sup>879</sup> and

b) there is no documentary evidence of the existence of the vacancy notification published for the National Judicial Registrar role that Matthew Benter was selected to fill.

[898] Matthew Benter was shortlisted for an interview, <sup>880</sup> interviewed, and was determined by the selection committee, which was made up of Sia Lagos, David Pringle and Andrea Jarratt, to not be the most meritorious candidate. <sup>881</sup> Nonetheless, the selection committee stated in the selection report for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in the Western Australia District Registry that Matthew Benter was “recommended for a different role in the NOR.” <sup>882</sup>

[899] Thus, and contrary to Mark Anstey’s finding that “some individuals who applied for a position at SES level were subsequently appointed to positions at EL2 level” and “were already employed by the agency at EL2 level”, only one individual (which is plainly not “some”), Phillip Allaway, “applied for a position at the SES level” and was “subsequently appointed to [a National Judicial Registrar position] at EL2 level” having already been employed by the agency at EL2 level (strictly speaking, APS employees are employed by the Commonwealth of Australia, and not a Statutory Agency, which does not have a legal identity distinct to the Commonwealth). <sup>883</sup> Thus, the majority of the

individuals, including Claire Gitsham and Matthew Benter, who applied for positions at SES level, and were subsequently engaged as National Judicial Registrars in the Federal Court and allocated Executive Level 2 classifications pursuant to **rule 6** of the *Public Service Classification Rules 2000* (Cth), were **not** already employed by the Commonwealth of Australia.

[900] It follows that any attempt to rely on Mark Anstey's findings that "some individuals who applied for a position at SES level were subsequently appointed to positions at EL2 level" and "were already employed by the agency at EL2 level" to exculpate Kate McMullan for her inadequate public interest disclosure investigation is vitiated by the falsehood of those findings.

[901] Matthew Benter was not an APS employee at the time he applied for a Senior Executive Service position in the Federal Court of Australia. Matthew Benter was not moved "at level" into an Executive Level 2 classified National Judicial Registrar vacancy (as I have already explained, there has never been a role evaluation for an Executive Level 2 classified National Judicial Registrar role and, thus, no such vacancy has ever formally existed in the Federal Court).

[902] Mark Anstey's findings are, thus, characteristically and unsurprisingly confused and misinformed.

#### *Ground 7*

[903] I adopt the reasoning in paragraphs [725] – [737].

#### *Ground 8*

[904] Mr Anstey stated that "[s]ections 25 and 26 of the *Public Service Act 1999* and section 46 of the Australian Public Service Commissioner's Directions 2022 allow for a person to be moved 'at level' or to be assigned different duties, i.e. a different role, at level." That finding or conclusion is both irrelevant to the situation and, as a matter of law, incorrect.

[905] I will dispose of the reliance placed on section 26 of the *Public Service Act 1999* (Cth) and section 46 of the *Australian Public Service Commissioner's Directions 2022* (Cth), before dealing with the application of section 25 of the *Public Service Act 1999* (Cth).

A. Section 26 of the *Public Service Act 1999* (Cth)

[906] Section 26 of the *Public Service Act 1999* (Cth) provides that the an Agency Head may enter into an agreement, in writing, with an APS employee for the employee to move to the Agency Head's Agency from another Agency.

[907] In other words, section 26 of the *Public Service Act 1999* (Cth) governs inter-agency transfers effected by written agreements between an Agency Head of an Agency, with an APS employee from a different Agency.

[908] Matthew Benter was not an APS employee when he was engaged into the Australian Public Service and allocated an Executive Level 2 classification, under **rule 6** of the *Public Service Classification Rules 2000* (Cth). Section 26 has no application to Matthew Benter or the disclosable conduct relating to his engagement.

[909] For that matter, section 26 of the *Public Service Act 1999* (Cth) has no application to a single one of:

- a) Caitlin Wu;
- b) Rohan Muscat;
- c) Murray Belcher;
- d) Russell Trott;
- e) Susan O'Connor;
- f) Claire Gitsham;
- g) Phillip Allaway;
- h) Rupert Burns; and / or
- i) Tuan Van Le,

because not a single one of these people were transferred into the Federal Court of Australia Statutory Agency from another Commonwealth Agency pursuant to a written agreement with the Agency Head of the Federal Court of Australia Statutory Agency.

[910] Thus, section 26 of the *Public Service Act 1999* (Cth) has no application to these people or to the disclosable conduct relating to their engagements of “promotions”.

[911] Therefore, Mr Anstey’s references to section 26 of the *Public Service Act 1999* (Cth) were pointless and irrelevant.

B. Section 46 of the *Australian Public Service Commissioner’s Directions 2022* (Cth)

[912] I adopt the reasoning in paragraphs [746] – [748] of this email.

C. Section 25 of the *Public Service Act 1999* (Cth)

[913] I adopt the reasoning in paragraphs [749] – [762] of this email.

## *Ground 9*

[914] I take issue with Mark Anstey’s failure to address Ms McMullan’s failure to investigate the allegation that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they engaged Matthew Benter to fill an Executive Level 2 role for which there had been no role evaluation, and for which there was no merit based selection process.

[915] I have already proved that there was no evidence, before Kate McMullan, of a role evaluation for a National Judicial Registrar role that had, for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth), been allocated an Executive Level 2 classification.

[916] I have already proved that there is no evidence of a role evaluation for a National Judicial Registrar role that had, for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth), been allocated an Executive Level 2 classification, independent of whether that evidence was before Kate McMullan during her public interest disclosure investigation.

[917] I have already proved that administrators in the Federal Court of Australia allocate classifications to individuals, under **rule 6** of the *Public Service Classification Rules 2000* (Cth), for the National Judicial Registrar role based on “[t]he additional responsibilities on top of the core registrar work that the **SES employees** undertake” and the ability to “fit” that person into the Statutory Agency without transgressing the capped number of SES positions. [884](#)

[918] I have already shown that the Assistant Director of People and Culture in the Federal Court of Australia shamelessly admits that individual flexibility arrangements are used to supplement the incomes of National Judicial Registrars who have been allocated an Executive Level 2 classification under **rule 6** of the *Public Service Classification Rules 2000* (Cth), particularly where the work value for the groups of duties to be performed is “higher than” the work value of the groups of duties based on the Commissioner’s work level standards for the Executive Level 2 classification. [885](#)

[919] And I have already shown that Matt Asquith flatly and shameless admits, “[t]his is often the case given that the agency has an SES Cap of 21.” [886](#)

[920] As I pointed out in my complaint to the Office of the Commonwealth Ombudsman on 26 October 2021, which Mark Anstey “investigated” before terminating the investigation on the basis of plainly unsupportable reasons, there was no evidence before Ms McMullan that, among other things: [887](#)

a) an Executive Level 2 classified National Judicial Registrar vacancy had been notified in the Public Service Gazette and, as a consequence, that the vacancy was notified as open to all eligible members of the community;

b) any applications were received for an Executive Level 2 classified National Judicial Registrar vacancy that Matthew Benter was engaged to fill; and

c) the aim and purpose of the selection process for the Executive Level 2 National Judicial Registrar role in the Western Australia District Registry of the Federal Court had been determined in advance.

[921] In response to a freedom of information request for access to “the vacancy notice for the National Judicial Registrar role, published in the Public Service Gazette or elsewhere, that Matthew Benter applied for and succeeded in being selected to fill”, [888](#) National Judicial Registrar & District Registrar Nicola Colbran refused to provide access to the document, pursuant to section 24A of the *Freedom of Information Act 1982* (Cth), because the document does not exist. [889](#)

[922] In response to a freedom of information request for access to the “the job application submitted for the National Judicial Registrar role that Matthew Benter was selected to fill” [890](#) National Judicial Registrar & District Registrar Nicola Colbran refused to provide access to the document, pursuant to section 24A of the *Freedom of Information Act 1982* (Cth), because the document does not exist or cannot be found. [891](#)

[923] Despite the fact that:

a) I have proved that there was no evidence, before Kate McMullan, of a role evaluation for a National Judicial Registrar role that had, for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth), been allocated an Executive Level 2 classification; and

b) I have proved that there is no evidence of a role evaluation for a National Judicial Registrar role that had, for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth), been allocated an Executive Level 2 classification, independent of whether that evidence was before Kate McMullan during her public interest disclosure investigation; and

c) I have proved that, contrary to the legislative requirements set out in section 20 of the *Australian Public Service Commissioner’s Guidelines 2016* (Cth) (which provides that a vacancy must be notified in order to meet the requirements for merit-based selection), no vacancy notice for the National Judicial Registrar role that Matthew Benter was selected to fill (on a full-time, ongoing basis from 30 January 2019) [892](#) was published in the Public Service Gazette or elsewhere; [893](#) and

d) I have proved that there is no evidence that Matthew Benter submitted a job application for the National Judicial Registrar role that he was selected to fill, [894](#) and for which she was granted an independent flexibility arrangement, which was used to increase his salary to more than \$190,000 [895](#) (higher than thenominal salary of the Senior Executive Band 1 classified National Judicial Registrar & District Registrar of the Victoria District Registry, Tim Luxton), [896](#) after being allocated an Executive Level 2 classification, under rule 6 of the *Public Service Classification Rules 2000* (Cth),

Mark Anstey concluded that the allegations that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they engaged Matthew Benter to fill an Executive Level 2 role for which there had been no role evaluation, and for which there was no merit based selection process were not substantiated because he “found that most of the key findings [that Kate McMullan made] were not unreasonable for the Investigating Agency to make.” [897](#)

[924] Ms McMullan’s failure to address the allegations demonstrates the inadequacy of public interest disclosure investigation. It was not appropriate for Mr Anstey to terminate his investigation into Ms McMullan’s failure to address the allegation without providing something more than “I found that most of the key findings [that Kate McMullan made] were not unreasonable for the Investigating Agency to make” particularly because I have proved that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they engaged Matthew Benter to fill an Executive Level 2 role for which there had been no role evaluation, and for which there was no merit based selection process (even though proving the allegations is emphatically not my duty).

[925] Plainly, Mark Anstey’s findings reflect the terminally confused and misinformed state of his mind.

### *Relief sought*

[926] I request that:

a) Mr Anstey’s decision to terminate the investigation under the *Ombudsman Act 1976* (Cth) be set aside on the basis of the grounds of review articulated above (both general and specific);

b) the Ombudsman make a finding that Kate McMullan’s finding that “[t]he evidence provided indicates that as a result of a role review, a determination was made that NJR positions could be held at the SESB1 level in some registrars, and at the Legal 2 level in other registrars” was not based on evidence;

c) the Ombudsman make a finding that Kate McMullan’s finding that “[t]he evidence provided indicates that as a result of a role review, a determination was made that NJR positions could be held at the SESB1 level in some registrars, and at the Legal 2 level in other registrars” was not based on any evidence available to her;

d) the Ombudsman make a finding that Kate McMullan’s finding in respect of the National Judicial Registrar roles, which was “a role review process ... had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load” is not justifiable and is, thus, wrong because, first, it is not permissible to classify or reclassify a role on the basis of the workload of the role, and, second, there was not evidence before Ms McMullan, and there is actually no evidence simpliciter, that there ever was a “role review process” such that the National Judicial Registrar role had been allocated an Executive Level 2 classification for the purposes of **rule 9** of the *Public Service Classification Rules 2000* (Cth);

e) the Ombudsman make a finding that Kate McMullan contravened her statutory duty, under the *Public Interest Disclosure Act 2013* (Cth), by functionally refusing to investigate the disclosable conduct that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct by handing out an Executive Level 2 classification to Matthew Benter, a person who was not employed in the Australian Public Service, under **rule 6** of the *Public Service Classification Rules 2000* (Cth) for a role i) that had never been allocated an Executive Level 2 classification under **rule 9** of the *Public Service Classification Rules 2000* (Cth); ii) that had never been the subject of a vacancy notification, which notified the Australian community that there was a role that eligible members of the community would be permitted to apply for; iii) the incumbent would receive a lavish independent flexibility arrangement, catapulting their nominal salary north of the salary of the most senior Senior Executive Band 1 classified role in the Victoria District Registry of the Court, even though the “substantive classification” for the role is, according to Kate McMullan and **no evidence whatsoever**, an Executive Level 2 classification under **rule 9** of the *Public Service Classification Rules 2000* (Cth), being a classification allocated to roles that are objectively less complex than Senior Executive Band 1 classified roles;

f) the Ombudsman make a finding that Kate McMullan failed to comply with procedures established under subsection 15(3) of the *Public Service Act 1999* (Cth) in investigating alleged breaches of the Code of Conduct and had thus failed to comply with paragraph 53(5)(b) of the *Public Interest Disclosure Act 2013* (Cth);

g) the Ombudsman prepare a report of his findings, and refer the matter back to the Australian Public Service Commissioner with a recommendation that the Commissioner reinvestigate the public interest disclosure according to law.

## **8. THE DECISION TO HAND PHILLIP ALLAWAY A NATIONAL JUDICIAL REGISTRAR ROLE**

Findings and outcomes of Kate McMullan’s investigation under the *Public Interest Disclosure Act 2013* (Cth)

[927] The investigator, Kate McMullan, made several findings, but there was one essential finding.

[928] In response to the allegation that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they held out Phillip Allaway as a National Judicial Registrar (a role for which there had been no role evaluation, and for which there was no merit based selection process), Ms McMullan made the following finding:

The relevant allegation is that Mr Allaway, Mr Burns and Mr Le were appointed to ... positions without proper process, or are being “held out” as ... officers when they were not appointed as such ...

None of the three was promoted to an SES1 NJR; they remained in Legal 2 positions with a change in title. As discussed earlier, as part of a broader review of roles in the FCA it is evident that NJR roles can be held at either the Legal 2 level or the SESB1 level. [898](#)

Errors alleged to have been committed by Kate McMullan in complaint lodged with the Office of the Commonwealth Ombudsman on 26 October 2021

[929] Ms McMullan made many errors but there were two fundamental errors, and a derivative error.

[930] First, in order for Ms McMullan’s finding that “as part of a broader review of roles in the FCA it is evident that NJR roles can be held at either the Legal 2 level or the SESB1 level” to be correct, it must be the case that a role review of a Senior Executive Band 1 classified National Judicial Registrar role, as distinct to the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – QLD role and the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – WA role, [899](#) was undertaken. [900](#) There was no evidence before Ms McMullan demonstrating that a role review had taken place such that the groups of duties associated with the National Judicial Registrar role had been allocated an Executive Level 2 classification. [901](#)

[931] Second, in order for Phillip Allaway to have been lawfully engaged to fill an Executive Level 2 National Judicial Registrar role in the Victoria District Registry of the Federal Court on an ongoing, full-time basis, and in order for Kate McMullan to have concluded that Phillip Allaway was selected according to a merit based selection process (and not the mere caprice of Sia Lagos, who has a history of engaging in cronyism and patronage), it was, among other things, necessary: [902](#)

a) for the vacancy, or a similar vacancy, in the Federal Court of Australia to be notified in the Public Service Gazette within a period of 12 months before the written decision to engage Mr Benter; [903](#) and

b) for the vacancy to have been notified as open to all eligible members of the community; [904](#) and

c) for the aim and purpose of the selection process for the Executive Level 2 National Judicial Registrar role in the Victoria District Registry of the Federal Court to have been determined in advance; [905](#) and

d) for information about the selection process for the Executive Level 2 National Judicial Registrar role in the Victoria District Registry of the Federal Court to have been readily available to applicants; [906](#) and

e) for the selection process for the Executive Level 2 National Judicial Registrar role in the Victoria District Registry of the Federal Court to be appropriately documented. [907](#)

[932] Aside from the fact that there was no evidence before Ms McMullan that a role evaluation had been conducted for a National Judicial Registrar role which had been allocated an Executive Level 2 classification, there was no evidence before Ms McMullan that, among other things: [908](#)

a) an Executive Level 2 classified National Judicial Registrar vacancy had been notified in the Public Service Gazette and, as a consequence, that the vacancy was notified as open to all eligible members of the community;

b) any applications were received for an Executive Level 2 classified National Judicial Registrar vacancy that Mr Allaway was engaged to fill; and

c) the aim and purpose of the selection process for the Executive Level 2 National Judicial Registrar role in the Victoria District Registry of the Federal Court had been determined in advance.

[933] That Ms McMullan found that there was “no disclosable conduct in regard to the change in position/title in regard to Mr Allaway, Mr Burns and Mr Le”, even though there was no evidence before Ms McMullan that:

a) a role review had taken place such that the National Judicial Registrar role had been allocated an Executive Level 2 classification for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth); and

b) Phillip Allaway was selected to fill a National Judicial Registrar role bearing an Executive Level 2 classification in the course of a merit-based selection process (rather than merely being rewarded for his loyalty to Sia Lagos in an act of patronage and cronyism),

demonstrates that Ms McMullan had failed, as part of her public interest disclosure investigation, to ascertain whether Phillip Allaway had been engaged according to law and that, accordingly, Ms McMullan’s finding that “I find no disclosable conduct in regard to the change in position/title in regard to Mr Allaway, Mr Burns and Mr Le” was made on something other than logically probative and relevant evidence. [909](#)

[934] Third, being the derivative error, Ms McMullan’s conclusion that the National Judicial Registrar could bear both an Executive Level 2 and Senior Executive Band 1 classification on no basis other than the relative work load and complexity of the work undertaken would mean that Ms McMullan was suggesting that a **constructive** broadbanding arrangement across a Senior Executive Band classification were permissible, even though it is explicitly prohibited under rule 9(5) of the *Public Service Classification Rules 2000* (Cth). [910](#)

#### Findings and outcomes of the investigation conducted by Mark Anstey of the Office of the Commonwealth Ombudsman

[935] On 12 December 2022, Mark Anstey, an acting Assistant Director in the Public Interest Disclosure Team of the Ombudsman’s Office, terminated an investigation, under the *Ombudsman Act 1976* (Cth), into the errors alleged to have been committed by Ms McMullan. [911](#)

[936] Mr Anstey claimed that the Ombudsman “cannot take any action that would cause an agency to reinvestigate a [public interest disclosure] ... because the [Public Interest Disclosure Act 2013 (Cth)] does not provide a mechanism for a finalised PID investigation to be reopened.” [912](#) The falsehood of that legal proposition has been part IV of this email.

[937] Mr Anstey claimed “most of the key findings were not unreasonable for the investigating agency to make.”<sup>913</sup> That proposition is false, not least for the reasons set out in part XI of this email. Further reasons demonstrating the falsehood of that proposition will be set out below.

[938] Mr Anstey concluded that “there is no practical outcome [the Ombudsman] could obtain by further investigating the complaint”, which, as I have demonstrated in part V of this email, is a falsehood, and, on that basis, terminated the investigation into the errors alleged to have been committed by Ms McMullan.<sup>914</sup>

[939] In terminating the investigation, Mr Anstey stated: <sup>915</sup>

I understand your view that there was not a properly documented review of roles and classifications that would allow an Agency Head to appoint individuals to the relevant position at SES1 or EL2 level.

Conducting and documenting a role review is not set down in legislation. The APS Classification Guide recommends a role review or role evaluation be carried out in certain circumstances, including reviews conducted because of a restructure or reorganisation within an agency. That said, ultimately it is at the discretion of the Agency Head to determine the duties of an employee and determine an appropriate classification based on those duties.

The PID Investigator concluded the material available indicated there had been a role review and the decision to reclassify these positions was made “*on the basis of the relative volume and complexity of work undertaken in the various registrars (sic)*”. I accept that you dispute this. I also appreciate the reasons for the decision could have been better communicated to agency staff, as the PID Investigator noted, and similarly the internal records could have been more detailed. It nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented.

[940] Mr Anstey also stated: <sup>916</sup>

I note your view the PID Investigator failed to address a key legal issue at the start of the investigation – this being the holding of a role at SES1 and EL2 classifications. As I understand it, you were concerned the implication of the PID investigation report was that “*it is acceptable for broadbanding arrangements to extend to SES classification*”. As you noted, there is no broadbanding between EL classifications and SES ...

While I acknowledge your views, what happened in this case does not appear to be a case of unlawful broadbanding – this being broadbanding between EL and SES classifications. In your complaint you said the records indicated a “*proposition that the ... role could bear a classification of both Executive Level 2 and SES Band 1*”. In my view, it appears the agency decided the position could have a classification of *either* EL2 or SES, depending on the requirements of the specific role ...

The arrangements the agency put in place for several appointees did not allow individuals appointed to the positions at EL2 level via an individual flexibility arrangement (IFA) to progress to the SES level without the need for an open, competitive selection process. As the Investigator noted, a decision was made that “*the NJR positions could be held at the SESB1 level in some registrars (sic), and at the Legal 2 level in other registrars (sic)*” due to an assessment about the differing volume and complexity of work in each registry. This does not appear to be a case of unlawful broadbanding. I accept the report could have provided more detail about how this alleged issue was assessed. However, the PID Investigator did not fail to identify and consider the issue.

Related to the PID Investigator’s alleged failure to properly consider this alleged unlawful broadbanding was your complaint the recruitment process inappropriately sought to avoid a cap that may have been placed on the number of positions to be offered at each level. In my view, when caps are in place – whether at SES or APS level – it is open to an agency to use an IFA to attract or retain talent if this meets a genuine operational need of the agency. Such a practice would not be a case of ‘getting around’ a cap in the sense of frustrating the underlying purpose of a cap, which is to limit the number of permanent employees at particular level. Unlike the entitlements that attach to permanent appointments to the APS a person’s IFA can be terminated at any time, including if it ceases to meet a genuine operational need. This is consistent with the accepted practice that agencies can use labour hire staff to meet genuine operational needs at considerably higher cost than permanent or non-ongoing staff so long as these actions are commensurate with relevant requirements under the *Public Governance, Performance and Accountability Act* (the PGPA Act).

I understand you were also concerned that some individuals who applied for a position at SES level were subsequently appointed to positions at EL2 level. In my view, it was reasonably open to the PID Investigator to not make a finding of disclosable conduct relating to the decision and decision-making process that led to appointing these individuals to positions at EL2 level. This is because it appears that relevant individuals were already employed by the agency at EL2 level. Sections 25 and 26 of the *Public Service Act 1999* and section 46 of the Australian Public Service Commissioner’s Directions 2002 allow for a person to be moved ‘at level’ or to be assigned different duties, i.e. a different role, at level. This provides agencies with the ability to move people into a different role, at level. In my view, it was open to the PID Investigator to not make a finding of disclosable conduct relating to the decision and decision-making process that led to existing substantive EL2 staff being moved ‘at level’ to a different role at the same EL2 level.

Grounds of review in respect of the decision to terminate the Ombudsman’s investigation

[941] The complaint in respect of broadbanding had plainly been too subtle for Mr Anstey to follow; Mr Anstey has missed the point. Naturally, “arrangements the agency put in place for several appointees did not allow individuals appointed to the positions at EL2 level via an individual flexibility arrangement (IFA) to progress to the SES level without the need for an open, competitive selection process” because the National Judicial Registrar role had never been allocated an Executive Level 2 classification under **rule 9** of the *Public Service Classification Rules 2000* (Cth). I was not suggesting that an *explicit* broadbanding arrangement had been effected; it would be impossible to effect an explicit broadbanding arrangement where the National Judicial Registrar role had **never** been the subject of a role review, such that an Executive Level 2 classification was allocated to the National Judicial Registrar role pursuant to **rule 9** of the *Public Service Classification Rules 2000* (Cth).

[942] Rather, Ms McMullan’s conclusion that the National Judicial Registrar could bear both an Executive Level 2 and Senior Executive Band 1 classification on no basis other than the relative work load and complexity of the work undertaken would mean that Ms McMullan was suggesting that a **constructive** broadbanding arrangement across a Senior Executive Band classification were permissible, even though it is explicitly prohibited under rule 9(5) of the *Public Service Classification Rules 2000* (Cth). Of course, as has already been noted in part VIII of this review application, work load can never be a ground for allocating a particular classification to a group of duties and, by force of logic, can never be relevant to a broadbanding arrangement.

[943] The complaint about *constructive* broadbanding is ultimately a derivative issue and, as such, will not be pressed in the grounds of review.

[944] The complaint about constructive broadbanding is derivative because it presupposes that the National Judicial Registrar role was the subject of a role re-evaluation (i.e. a role review) such that, following a lawful review, an Executive Level 2 classification was allocated to the National Judicial Registrar role, for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth), on the basis that “*the NJR positions could be held at the SESB1 level in some registrars (sic), and at the Legal 2 level in other registrars (sic)*’ due to an assessment about the differing volume and complexity of work in each registry.”

[945] While it is difficult to prove a negative, I will demonstrate that there never was a role review and, as such, there was no evidentiary basis for finding that “*the NJR positions could be held at the SESB1 level in some registrars (sic), and at the Legal 2 level in other registrars (sic)*’ due to an assessment about the differing volume and complexity of work in each registry.”

[946] My grounds of review are as follows:

- 1) Mr Anstey's claim that "[t]he APS Classification Guide *recommends* a role review or role evaluation be carried out in certain circumstances ..." is false;
- 2) Mr Anstey's claim that "[c]onducting and documenting a role review is not set down in legislation" is stunted and misinformed because the legal obligation to conduct and document a role review is legislatively mandated;
- 3) Mr Anstey's claim that "ultimately it is at the discretion of the Agency Head to determine the duties of an employee and determine an appropriate classification based on those duties" is false;
- 4) Mr Anstey's claim that "[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented" is unjustifiable;
- 5) The fact that Mr Anstey was unperturbed by Ms McMullan's finding that a "decision to reclassify these positions was made *on the basis of the relative volume and complexity of work undertaken in the various registrars (sic)*" demonstrates a failure on Mr Anstey's part to understand how classification decisions are to be made;
- 6) Mr Anstey's claims about the "SES cap" are, in the light of the evidence, misinformed;
- 7) Mr Anstey's claim that "[s]ections 25 and 26 of the *Public Service Act 1999* and section 46 of the Australian Public Service Commissioner's Directions 2022 allow for a person to be moved 'at level' or to be assigned different duties, i.e. a different role, at level" is irrelevant and incorrect; and
- 8) Mr Anstey's failure to address Ms McMullan's failure to investigate the allegation that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they handed Phillip Allaway a National Judicial Registrar role for which there had been no role evaluation, and for which there was no merit based selection process.

[947] I adopt the reasoning in paragraphs [292] – [301] of this email.

#### *Ground 2*

[948] I adopt the reasoning in paragraphs [302] – [314] of this email.

#### *Ground 3*

[949] I adopt the reasoning in paragraphs [315] – [318] of this email.

#### *Ground 4*

[950] Mr Anstey’s claim that “[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented” is unjustifiable.

[951] I repeatedly noted, in the complaint lodged with the Office of the Commonwealth Ombudsman on 26 October 2021, that there was no evidence before Ms McMullan that a role review of the National Judicial Registrar role had ever been conducted, such that the National Judicial Registrar role was allocated an Executive Level 2 classification for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth), and that Ms McMullan’s claims that a role review of the National Judicial Registrar role was not based on any cogent or probative evidence. [917](#)

[952] Acknowledging the challenge of proving a negative, I will demonstrate how Ms McMullan’s claim that a role review of the National Judicial Registrar role had been undertaken, and how Mr Anstey’s claim that “[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented”, were based on the false premise that there is evidence that a role review had been conducted.

[953] While neither Ms McMullan (in contravention of her duties under subsection 51(3) of the *Public Interest Disclosure Act 2013* (Cth) and section 13 of the *Public Interest Disclosure Standard 2013* (Cth)) nor Mr Anstey identified the item of evidence that Mr Anstey claimed was the Agency Head's documented decision that "it was appropriate and necessary for some positions to be held at EL2 level", decision makers in the Australian Public Service Commission has provided a publicly accessible clue.

A. The Australian Public Service Commission's claims about documents supporting the finding that "a role review process ... had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load"

[954] I adopt the reasoning in paragraph [632] of this email.

B. Assessment of the relevance of the "Email correspondence between Commission and Federal Court of Australia titled 'PRIVATE AND CONFIDENTIAL' dated 27 October 2020" to Mr Anstey's claim that "[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented"

[955] I adopt the reasoning in paragraphs [633] – [639] of this email.

C. Assessment of the relevance of the "Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia" to Mr Anstey's claim that "[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented"

[956] This leads to the second document that Ms Strangio identified as being a document (including classification assessments, broadbanding proposals etc) that was provided to Kate McMullan of the Australian Public Service Commission that supports her finding that allegations of impropriety and, presumably, unlawful conduct in the context of the recruitment of National Judicial Registrars were unsubstantiated because there had been "a role review process that had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load."

[957] Ms Strangio claimed that the “Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia” supports Ms McMullan’s finding that allegations of impropriety and, presumably, unlawful conduct in the context of the recruitment of National Judicial Registrars were unsubstantiated because there had been “a role review process that had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load.”

[958] The *Judicial Registrar Recruitment* document is an eight page document. [918](#)

[959] The document commences as follows: [919](#)

Further to my memorandum of 22 August 2018 regarding the registrar recruitment exercise, this paper provides a further update on the recruitment exercise and recommendations endorsed by the recruitment panel for the appointment of candidates to the Senior National Judicial Registrar (SES2), National Judicial Registrar & District Registrar - VIC, QLD and WA (SES1), Judicial Registrar & District Registrar - TAS (Legal 2) and National Judicial Registrar – Native Title (SES1) positions, subject to your consideration and approval.

[960] Among other things, the author of the document sets out, in a table commencing on page 4, Federal Court registrar roles for which recruitment processes had been undertaken, identifies the classifications allocated to the roles under **rule 9** of the *Public Service Classification Rules 2000* (Cth), and identifies the candidates selected by the selection committees for the relevant registrar roles in the Federal Court.

[961] One of the roles identified in the table is the “National Judicial Registrar & District Registrar – QLD Registry (SES1).” [920](#) I note that the National Judicial Registrar & District Registrar role is the Queensland District Registry of the Federal Court bears a Senior Executive Band 1 classification. [921](#)

[962] The names of three lead candidates are set out in the column next to the position, and comments are set out in relation to the lead candidates in a column next to their names. [922](#) The name of the candidate selected by the selection committee consisting of Sia Lagos, David Pringle and Andrea Jarratt to fill the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role is the Queensland District Registry of the Federal Court is Murray Belcher. [923](#) Kerry Vine-Camp, the Australian Public Service Commissioner’s representative for the purposes of the selection process for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy, certified that she had been a full participant in the selection process, and that the selection process complied with subsection 10A(2) of the *Public Service Act 1999* (Cth) and the *Australian Public Service Commissioner’s Directions 2016* (Cth). [924](#)

[963] In the column next to Mr Belcher's name is the following typed comment: [925](#)

Appoint to position subject to Murray's existing Judicial Registrar (Legal 2) position not backfilled.

Refer to Greenwood J memorandum

[964] Next to the typed comment is a handwritten note – "No SES". [926](#)

[965] Another one of the roles identified in the table is the "National Judicial Registrar & District Registrar – WA Registry (SES1)." [927](#) I note that the National Judicial Registrar & District Registrar role is the Western Australia District Registry of the Federal Court bears a Senior Executive Band 1 classification in the table. [928](#)

[966] The names of three lead candidates are set out in the column next to the position, and comments are set out in relation to the lead candidates in a column next to their names. [929](#) The name of the candidate selected by the selection committee consisting of Sia Lagos, David Pringle and Andrea Jarratt to fill the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role is the Western Australia District Registry of the Federal Court is Russell Trott. [930](#) Kerryn Vine-Camp, the Australian Public Service Commissioner's representative for the purposes of the selection process for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in the Western Australia District Registry, certified that she had been a full participant in the selection process, and that the selection process complied with subsection 10A(2) of the *Public Service Act 1999* (Cth) and the *Australian Public Service Commissioner's Directions 2016* (Cth). [931](#)

[967] In the column next to Mr Trott's name is the following typed comment: [932](#)

Appoint to position.

Russell's existing Judicial Registrar (Legal 2) position: backfill with Matthew Benter.

[968] Next to the typed comment is a handwritten note – "No SES BUT DR IFA". [933](#)

[969] The third of the roles identified in the table is the “National Judicial Registrar & District Registrar – VIC Registry (SES1).”<sup>934</sup> I note that the National Judicial Registrar & District Registrar role is the Victoria District Registry of the Federal Court bears a Senior Executive Band 1 classification in the table.<sup>935</sup>

[970] The names of four lead candidates are set out in the column next to the position, and comments are set out in relation to four candidates in a column next to their names.<sup>936</sup> The name of the candidate selected by the selection committee consisting of Sia Lagos, David Pringle and Andrea Jarratt to fill the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role is the Victoria District Registry of the Federal Court is Tim Luxton.<sup>937</sup> Kerryn Vine-Camp, the Australian Public Service Commissioner’s representative for the purposes of the selection process for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in the Victoria District Registry, certified that she had been a full participant in the selection process, and that the selection process complied with subsection 10A(2) of the *Public Service Act 1999* (Cth) and the *Australian Public Service Commissioner’s Directions 2016* (Cth).<sup>938</sup>

[971] One of the unsuccessful candidates for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in the Western Australia District Registry was Phillip Allaway.<sup>939</sup>

[972] In the column next to Mr Allaway’s name is the following typed comment: <sup>940</sup>

No offer.

[973] Next to the typed comment is a handwritten note – “X”.<sup>941</sup>

[974] I draw your attention to the fact that **no offer** of a National Judicial Registrar role was made to Phillip Allaway following a merit based selection process for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in the Victoria District Registry of the Federal Court of Australia.<sup>942</sup> There is no mention whatever of an Executive Level 2 classified National Judicial Registrar role in the *Judicial Registrar Recruitment* document. Nor is there any mention of Phillip Allaway being engaged to fill an Executive Level 2 classified National Judicial Registrar role in the *Judicial Registrar Recruitment* document.

[975] On the eighth page of the document is a handwritten note, which reads:

Sia

Changes to be managed within 17/18 NOR appropriation. Proposed recruitment approved subject to me seeing & approving reconciliation of costs against budget by Finance Dept (Kat Hunter & Catherine Sullivan).

SES positions WA & QLD not to be filled – positions to be transferred to Sydney – WA & QLD DRs to be filled at Legal 2 with allowance (IFAs) if possible.

[976] The document was signed by Warwick Soden and dated “25/9/18”.

[977] I now proceed to demonstrate why Mr Anstey’s claim that “[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented” is unjustified.

[978] It has already been established that:

a) under the *Public Service Act 1999* (Cth), the Commissioner’s functions include strengthening the professionalism of the Australian Public Service and facilitating continuous improvement in workforce management;<sup>943</sup> upholding high standards of integrity and conduct in the Australian Public Service;<sup>944</sup> developing, reviewing and evaluating workforce management policies and practices;<sup>945</sup> and doing anything incidental to or conducive to the performance of the Commissioner’s functions; <sup>946</sup> and

b) the *Australian Public Service Classification Guide* sources its existence in the legislated functions of the Australian Public Service Commissioner;

c) the *Australian Public Service Classification Guide* provides that “[t]horough information and documentation procedures in relation to classification decisions are necessary elements in safeguarding the integrity of the process;”<sup>947</sup> “[a] decision to allocate a new or revised classification level to a job is made under delegated authority under the *Public Service Act 1999* and the *Public Service Classification Rules 2000*”, and that “[t]his means that a record of decision **must** be made, including the reasons for the decision”;<sup>948</sup> documenting reasons for the classification decision is **necessary** to safeguard the integrity and transparency of the decision outcome; <sup>949</sup>in the context of

documenting classification decisions, “a record **must** be kept of decisions made when exercising authority under the [Public Service] Act or the Classification Rules”; [950](#) and

d) the instructions contained in the *Australian Public Service Classification Guide* are communicated in mandatory language; and

e) in essence, there is no discretion on the part of an Agency Head, or his or her delegate, to refuse to gather evidence in a structured and systematic way to understand the role; or to refuse to conduct an assessment against established criteria, including the work level standards, because “[t]he allocation of an APS Level classification, Executive Level classification or SES classification **must** be based on the work value of the group of duties **described in the work level standards for that classification**, issued in writing, by the Commissioner”; or to fail to maintain documentary records of the decision by which a classification is allocated to a role, as well as the reasons for that decision; and

f) Agency Heads, [951](#) Statutory Office Holders, [952](#) and APS employees are legally obligated to, at all times, behave in a way that upholds the APS Values, [953](#) which includes acting in a way that is right and proper, as well as technically and legally correct or preferable; [954](#) and

g) it cannot be contended that it is ever right and proper, as well as technically and legally correct or preferable to dismiss the mandatory instructions of the Australian Public Service Commissioner and conduct a role evaluation with a view to allocating a classification where a) evidence is not gathered in a structured and systematic way to understand the role; b) the role is not assessed and measured against established criteria, including the work level standards, particularly because rule 9(2A) of the *Public Service Classification Rules 2000* (Cth) requires that “[t]he allocation of an APS Level classification, Executive Level classification or SES classification **must** be based on the work value of the group of duties **described in the work level standards for that classification**, issued in writing, by the Commissioner”; and c) documentary records of the decision by which a classification is allocated to a role, as well as the reasons for that decision, are not properly documented.

[979] First and plainly, nothing in the *Judicial Registrar Recruitment* document even comes close to supporting the view that a role review of the National Judicial Registrar role had been conducted such that an Executive Level 2 classification had been to the groups of duties for that role based on the work value described in the work level standards for that classification.

[980] Second, it has already been established that:

a) role evaluation records prepared between 1 January 2017 and 31 December 2020, that show that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar roles in Queensland and Western Australia were, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated Executive Level 2 classifications for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth) do not exist;<sup>955</sup> and

b) Mr Soden's (the Agency Head's) comments "WA & QLD DRs to be filled at Legal 2 with allowance (IFAs) if possible" on the eighth page of the *Judicial Registrar Recruitment* document<sup>956</sup> could not possibly relate to the allocation of Executive Level 2 (i.e. Legal 2) classifications to the groups of duties for the National Judicial Registrar & District Registrar roles in Queensland and Western Australia because consideration of an independent flexibility arrangement or its use is of no relevance to the allocation of an approved classification, under **rule 9** of the *Public Service Classification Rules 2000* (Cth), to each group of duties to be performed in any agency, and, as such, the comments are actually about the allocation of Executive Level 2 (i.e. Legal 2) classifications to Murray Belcher and Russell Trott pursuant to **rule 6** of the *Public Service Classification Rules 2000* (Cth); and

c) Mr Soden's statement that the SES "positions [are] to be transferred to Sydney" could not possibly mean that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar roles in the Queensland and Western Australia District Registries would be transferred to Sydney because a District Registrar is, by law, required to be located in the District Registry of the relevant State,<sup>957</sup> and that, rather, and was actually the case, the classification that would have been allocated to District Registrars were, under **rule 6** of the *Public Service Classification Rules 2000* (Cth), allocated (or, as happened in one case, proposed to be allocated) to people based in Sydney (i.e. Susan O'Connor and Drew Pearson).<sup>958</sup>

[981] The most and best that can be said of Mr Anstey's finding that "the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented" is that Mr Soden had, in the absence of a lawful role review for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar roles in the Queensland and Western Australia District Registries, decided to allocate Executive Level 2 (i.e. Legal 2) classifications to Murray Belcher and Russell Trott under **rule 6** of the *Public Service Classification Rules 2000* (Cth).

[982] In the proven absence of any documentary evidence of role evaluation records, prepared between 1 January 2017 and 31 December 2020, which show that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar roles in Queensland and Western Australia were, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated Executive Level 2 classifications for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth),<sup>959</sup> Mr Anstey's finding that the Agency Head's decision to allocate Executive Level 2 classifications to Murray Belcher and Russell Trott under **rule 6** of the *Public Service Classification Rules 2000* (Cth) made it "reasonably open" for "the PID Investigator to have concluded that there was a review conducted as the Agency Head had

decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented” is absurd. It is the mark of a very confused and ill-informed mind. It is the mark of a person who has a pathetic command of the law. It is the mark of a person who would dismiss the explicit legislative requirement that findings of fact made by a public interest disclosure investigator be based on logically probative evidence, [960](#) and that the evidence relied on in the investigation be relevant. [961](#) It is the mark of a person with zero forensic aptitude (even though his role is to conduct investigations). Indeed, it is the mark of an incompetent (or archtypal?) public servant.

[983] It therefore follows that the “Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia” cannot reasonably be relied on by Mr Anstey’s claim that “[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a [role] review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented.”

[984] At this point, it is worth noting that even Charmaine Sims, the General Counsel of the Australian Public Service Commission, has had trouble justifying how it is that the “Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia” supports Kate McMullan’s finding that allegations of impropriety and, presumably, unlawful conduct in the context of the recruitment of National Judicial Registrars were unsubstantiated because there had been “a role review process that had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load.”

[985] According to submissions provided to the Office of the Australian Information Commissioner on 3 November 2022, Charmaine Sims states: [962](#)

Document 2 (Judicial Registrar Recruitment Outcome) was prepared by the Federal Court in the context of a recruitment process and was provided to Ms McMullan during the course of a PID investigation. The Commission acknowledges the primary purpose of the document is not for a role review. However, in the Commission’s view, this document provides the elements required at a high level for a role review **to be** conducted.

[986] No supporting reasons are provided to support Ms Sims’ assertion that “in the Commission’s view, [the Judicial Registrar Recruitment Outcome] document provides the elements required at a high level for a role review **to be** conducted.” Nor is there any evidence that the “role review” was **actually** conducted. On the contrary, a freedom of information decision maker in the Federal Court of Australia has, in response to a request for the role evaluation records prepared between 1 January 2017 and 31 December 2020, that show that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar roles in Queensland and Western Australia were, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated Executive Level 2 classifications for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth), [963](#) explicitly refused to provide access to those documents because they do not exist or cannot be found. [964](#)

[987] I doubt the Information Commissioner will be quite as confused and ill-informed as Mark Anstey has been when the time comes to assess whether the *Judicial Registrar Recruitment* document is a document “that support[s] acting assistant commissioner Kate McMullan’s conclusion that, in relation to the ‘National Judicial Registrar role’, ‘a role review process ... had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load.’”

D. Public concessions made by decision makers in the Federal Court of Australia about “role reviews” conducted in respect of the National Judicial Registrar role

[988] As has already been noted, an access applicant applied, under the *Freedom of Information Act 1982* (Cth), to the Australian Public Service Commission for access to “any and all documents (including but not limited to classification evaluation documents prepared for the ‘Legal 2’ and ‘SES1’ classification level registrar positions referred to in an Australian article published on 9 February 2022 titled Federal Court boss warned on job rule sidestep) that support acting assistant commissioner Kate McMullan’s conclusion that, in relation to the ‘National Judicial Registrar role’, ‘a role review process ... had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load’” <sup>965</sup> and Giorgina Strangio claimed that there were two documents that met the terms of that access request: a) the “Email correspondence between Commission and Federal Court of Australia titled ‘PRIVATE AND CONFIDENTIAL’ dated 27 October 2020”; and b) the “Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia.” <sup>966</sup> Ms Strangio refused to grant access to the documents on public interest grounds. <sup>967</sup>

[989] I now turn to several freedom of information decisions that outright contradict the freedom of information decisions that were made by decision makers in the Australian Public Service Commission about the existence of documents supporting Kate McMullan’s finding that “allegations of impropriety and, presumably, unlawful conduct in the context of the recruitment of National Judicial Registrars were unsubstantiated because there had been ‘a role review process that had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load.’”

[990] First, a near identically worded freedom of information request was also addressed to the Federal Court of Australia.

[991] On 20 March 2022, an access applicant applied to the Federal Court of Australia for access to “any and all documents (including but not limited to classification evaluation documents prepared for the ‘Legal 2’ and ‘SES1’ classification level registrar positions referred to in an Australian article published on 9 February 2022 titled Federal Court boss warned on job rule sidestep) that support acting assistant commissioner Kate McMullan’s conclusion that, in relation to the ‘National Judicial

Registrar role', 'a role review process ... had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load.'" [968](#)

[992] On 20 June 2022, Nicola Colbran, National Judicial Registrar & District Registrar of the South Australia District Registry, and an authorised decision maker for the Federal Court of Australia under the *Freedom of Information Act 1982* (Cth), set aside Registrar Claire Hammerton Cole's initial decision [969](#) and, on internal review, refused to provide access to the requested documents pursuant to section 24A of the *Freedom of Information Act 1982* (Cth) because "the documents cannot be found or do not exist." [970](#)

[993] Ms Colbran, the most senior Federal Court registrar in South Australia, who regularly exercises the judicial power of the Commonwealth under direction and, as such, knows a thing or two about logically probative evidence and relevant evidence, was unconvinced that there were any documents in the possession of the Federal Court of Australia that in any way "support acting assistant commissioner Kate McMullan's conclusion that, in relation to the 'National Judicial Registrar role', 'a role review process ... had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load.'" Ms Colbran explicitly stated that the documents being sought, which were "1. documents that were provided to Kate McMullan; and 2. are evidence that 'a role review process that had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load'" did not exist. [971](#)

[994] It cannot both be the case that, as decision makers in the Australian Public Service Commission have contended, two documents, both of which find their provenance in the Federal Court of Australia, support Kate McMullan's finding that "in relation to the 'National Judicial Registrar role', 'a role review process ... had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load'" and that, as the most senior Federal Court registrar in South Australia stated, the Federal Court has no documents that support Kate McMullan's finding that "in relation to the 'National Judicial Registrar role', 'a role review process ... had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load.'" Either the documents exist, or they do not.

[995] Second, in response to a freedom of information request submitted to the Federal Court of Australia on 26 February 2022 for access to "i. documents recording the 'role review processes' that Kate McMullan based her conclusions on [and] ii. documents setting out the classification assessments for the Legal 2 and SES1 versions of the National Judicial Registrar role that Kate McMullan would presumably have referred to when drawing her conclusions ..." [972](#) National Judicial Registrar & District Registrar Nicola Colbran, a woman who knows a thing or two about logically probative evidence and relevant evidence, refused, pursuant to section 24A of the *Freedom of Information Act 1982* (Cth), to provide access to the requested documents because no such documents existed or could be found. [973](#)

[996] Third, freedom of information decision makers in the Federal Court of Australia have consistently refused to provide access to “the classification evaluation for the National Judicial Registrar role that Matthew Benter applied for and was selected to fill” [974](#) under section 24A of the *Freedom of Information Act 1982* (Cth) because the document does not exist / cannot be found. [975](#) The original decision maker, Claire Hammerton Cole, noted in her decision dated 30 June 2022: [976](#)

I have decided, pursuant to subsection 24A(1) of the FOI Act, to refuse that paragraph of your request for access to documents as I am satisfied that all reasonable steps have been taken to find the documents you have requested (classification evaluations), but the documents cannot be found or do not exist.

[997] On internal review, the reviewing officer, National Judicial Registrar & District Registrar Nicola Colbran, a woman who knows a thing or two about logically probative evidence and relevant evidence, affirmed Claire Hammerton Cole’s decision that “the classification evaluation for the National Judicial Registrar role that Matthew Benter applied for and was selected to fill” did not exist or could not be found. [977](#)

[998] Fourth, and most telling, in response to a freedom of information request for “access to the role evaluation records, prepared between 1 January 2017 and 31 December 2020, that show that the SES Band 1 classified National Judicial Registrar role in the Federal Court was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the Public Service Classification Rules 2000”, [978](#) an authorised officer in the Federal Court refused to grant access to role evaluation records because they do not exist or cannot be found. [979](#)

[999] The upshot? Authorised decision makers in the Federal Court of Australia have consistently, publicly, unequivocally and unambiguously conceded the humiliating truth that there is no documentary evidence of a role evaluation record (or role review record) that shows that the National Judicial Registrar role in the Federal Court was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of **rule 9** of the *Public Service Classification Rules 2000* (Cth). Yet Mark Anstey claims “[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented.” [980](#) Go figure.

E. Conclusions about Mark Anstey’s finding that “[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented”

[1000] I have shown that:

a) the General Counsel in the Australian Public Service Commission has sheepishly conceded, in response to a request for further information from the Office of the Australian Information Commissioner, that the *Judicial Registrar Recruitment Outcome* document, which was provided to the Office of the Commonwealth Ombudsman on 26 October 2021 in the form of Annexure EDR – 93, is not evidence of “a role review process that had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load”,<sup>981</sup> even though the Australian Public Service Commission originally tried to pass off that document as evidence of “a role review process that had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load”;<sup>982</sup>

b) Nicola Colbran, the most senior Federal Court registrar in South Australia, has publicly conceded the humiliating fact that there are no documents in the possession of the Federal Court of Australia demonstrating “in relation to the ‘National Judicial Registrar role’, ‘a role review process ... had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load’”;<sup>983</sup>

c) two registrars of the Federal Court of Australia have publicly conceded the humiliating fact that “the classification evaluation for the National Judicial Registrar role that Matthew Benter applied for and succeeded in being selected to fill”<sup>984</sup> do not exist or cannot be found;<sup>985</sup>

d) B Henderson, an authorised decision maker for the purposes of the *Freedom of Information Act 1982* (Cth), has publicly conceded the humiliating fact that the “role evaluation records, prepared between 1 January 2017 and 31 December 2020, that show that the SES Band 1 classified National Judicial Registrar & District Registrar role in Queensland was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the Public Service Classification Rules 2000” do not exist;<sup>986</sup>

e) B Henderson, an authorised decision maker for the purposes of the *Freedom of Information Act 1982* (Cth), has publicly conceded the humiliating fact that the “role evaluation records, prepared between 1 January 2017 and 31 December 2020, that show that the SES Band 1 classified National Judicial Registrar & District Registrar role in Western Australia was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the Public Service Classification Rules 2000” do not exist;<sup>987</sup> and

f) B Henderson, an authorised decision maker for the purposes of the *Freedom of Information Act 1982* (Cth), has publicly conceded the humiliating fact that the “the role evaluation records, prepared between 1 January 2017 and 31 December 2020, that show that the SES Band 1 classified National Judicial Registrar role in the Federal Court was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the Public Service Classification Rules 2000” do not exist. [988](#)

[1001] Thus, I have demonstrated that, contrary to Kate McMullan’s finding, there is no evidence of “a role review process that had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load.” [989](#) Of course, that is to say nothing of the impermissibility of classifying or reclassifying a role on the basis of the “work load” of the role, which is a patent error that Mark Anstey refused to engage with. [990](#)

[1002] Now, putting to one side the impermissibility of classifying or reclassifying a role on the basis of the “work load” of that role, in order to support Kate McMullan’s finding that “allegations of impropriety and, presumably, unlawful conduct in the context of the recruitment of National Judicial Registrars were unsubstantiated because there had been ‘a role review process that had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load’”, Kate McMullan was required, pursuant to subsection 12(1) of the *Public Interest Disclosure Standard 2013* (Cth), to base her finding of fact on logically probative evidence.

[1003] Naturally, notations made by the Agency Head on the “Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia” [991](#) that Murray Belcher and Russell Trott were to be allocated Executive Level 2 (i.e. Legal 2) classifications pursuant to **rule 6** of the *Public Service Classification Rules 2000* (Cth) so that the Senior Executive Band 1 classifications that they were entitled to be allocated under **rule 6** (because both had, on their merits, been selected for promotion to Senior Executive Band 1 classification National Judicial Registrar & District Registrar roles) could be “transferred” to Sydney so that Susan O’Connor and Drew Pearson, candidates who had not applied for any Senior Executive Band 1 classified National Judicial Registrar vacancies, could be allocated those Senior Executive Band 1 classifications pursuant to **rule 6** are not **logically probative** of the fact that ‘a role review process [resulting] in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load.’”

[1004] In order for the notation to be logically probative, the notations would, pursuant to **rule 9** of the *Public Service Classification Rules 2000* (Cth), have to, or have to tend to, logically prove the existence or non-existence of: [992](#)

a) the allocation of an approved classification to the groups of duties to be performed by the National Judicial Registrars & District Registrars in the Queensland and Western Australia District Registries; [993](#) and

b) the allocation of an Executive Level 2 classification to the group of duties based on the work value of the group of duties described in the work level standards for the Executive Level 2 classification, issued, in writing, by the Australian Public Service Commissioner. [994](#)

[1005] The notations prove the existence of the Agency Head's intention to allocate of approved classifications to Murray Belcher and Russell Trott, APS employees, under **rule 6** of the *Public Service Classification Rules 2000* (Cth). The notations do not prove, or tend to prove:

a) the allocation of an approved classification to the groups of duties to be performed by the National Judicial Registrars & District Registrars in the Queensland and Western Australia District Registries; [995](#) and

b) the allocation of an Executive Level 2 classification to the group of duties based on the work value of the group of duties described in the work level standards for the Executive Level 2 classification, issued, in writing, by the Australian Public Service Commissioner. [996](#)

[1006] Therefore, the notations are not **logically probative** of the allocation of an approved classification (in this case, the allocation of Executive Level 2 classifications to the groups of duties for the National Judicial Registrar & District Registrar roles in the Queensland and Western Australia District Registries of the Federal Court of Australia) to the groups of duties to be performed for the National Judicial Registrar & District Registrar roles in the Queensland and Western Australia District Registries of the Federal Court of Australia.

[1007] **More to the point**, in no universe is it possible for a person to conclude that, because the Agency Head recorded hand written notations on the "Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia" document that Murray Belcher and Russell Trott were to be allocated Executive Level 2 (i.e. Legal 2) classifications for the purposes of **rule 6** of the *Public Service Classification Rules 2000* (Cth) so that the Senior Executive Band 1 classifications that they were entitled to on their merits could be "transferred" to Sydney so that Susan O'Connor and Drew Pearson, two candidates who had not applied for the Senior Executive Band 1 classified National Judicial Registrar roles in Sydney (because those vacancies were never notified in the Public Service Gazette) [997](#) would receive those Senior Executive Band 1 classifications, a "role review process" was undertaken such that the Senior Executive Band 1 classified National Judicial Registrar role (a role that was separate and distinct to the National Judicial Registrar & **District Registrar** roles) was, in light of the work value of the group of duties described in the work level standards and

a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth).

[1008] So that the point is not lost on the Ombudsman's finest, a notation on the "Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia" that an Executive Level 2 (i.e. Legal 2) classification is to be allocated to Murray Belcher, pursuant to **rule 6** of the *Public Service Classification Rules 2000* (Cth), does not prove the fact, or does not tend to prove the fact, that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Queensland was the subject of a "role review", such that the role was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of **rule 9** of the *Public Service Classification Rules 2000* (Cth).

[1009] All that the notation proves is that the Agency Head proposed to allocate an Executive Level 2 (i.e. Legal 2) classification to Murray Belcher, pursuant to rule 6 of the *Public Service Classification Rules 2000* (Cth), so that the Senior Executive Band 1 classification that would rightfully have been allocated to Murray Belcher under rule 6 of the *Public Service Classification Rules 2000* (Cth) could be transferred to Sydney to be allocated to either one of Susan O'Connor or Drew Pearson.

[1010] Thus, the notation does not logically prove, or even tend to prove, that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Queensland was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth) (i.e. was the subject of a role review). Moreover, the notation, being a notation about the allocation of an Executive Level 2 (i.e. Legal 2) classification to Murray Belcher does not make the existence of the fact that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Queensland was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth) more probable or less probable than it would be without the evidence of the notation that Murray Belcher was to be allocated an Executive Level 2 classification for the purposes of rule 6 of the *Public Service Classification Rules 2000* (Cth).

[1011] So that the point is not lost on the Ombudsman's finest, a notation on the "Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia" that an Executive Level 2 (i.e. Legal 2) classification is to be allocated to Russell Trott, pursuant to **rule 6** of the *Public Service Classification Rules 2000* (Cth), does not prove the fact, or does not tend to prove the fact, that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Western Australia was the subject of a "role review", such that the role was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of **rule 9** of the *Public Service Classification Rules 2000* (Cth).

[1012] All that the notation proves is that the Agency Head proposed to allocate an Executive Level 2 (i.e. Legal 2) classification to Russell Trott, pursuant to rule 6 of the *Public Service Classification Rules 2000* (Cth), so that the Senior Executive Band 1 classification that would rightfully have been allocated to Murray Belcher under rule 6 of the *Public Service Classification Rules 2000* (Cth) could be transferred to Sydney to be allocated to either one of Susan O'Connor or Drew Pearson. Thus, the notation does not logically prove, or even tend to prove, that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Western Australia was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth) (i.e. was the subject of a role review).

[1013] Moreover, the notation, being a notation about the allocation of an Executive Level 2 (i.e. Legal 2) classification to Russell Trott does not make the existence of the fact that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Western Australia was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth) more probable or less probable than it would be without the evidence of the notation that Russell Trott was to be allocated an Executive Level 2 classification for the purposes of rule 6 of the *Public Service Classification Rules 2000* (Cth).

[1014] So that the point is not lost on the Ombudsman's finest, notations left by the Agency Head on the "Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia" to allocate Executive Level 2 (i.e. Legal 2) classifications to Murray Belcher and Russell Trott, pursuant to rule 6 of the *Public Service Classification Rules 2000* (Cth), are not logically probative of, or relevant to, a finding that the Senior Executive Band 1 classified National Judicial Registrar & District Registrar roles in Queensland and Western Australia were, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated Executive Level 2 classifications for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth).

[1015] **Still less**, notations left by the Agency Head on the "Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia" to allocate Executive Level 2 (i.e. Legal 2) classifications to Murray Belcher and Russell Trott, pursuant to **rule 6** of the *Public Service Classification Rules 2000* (Cth), are not logically probative of the finding that the Senior Executive Band 1 National Judicial Registrar role, which neither Murray Belcher nor Russell Trott applied for, and which was never publicly notified in the Public Service Gazette, <sup>998</sup> and **which is an altogether different to the Senior Executive Band 1 classified National Judicial Registrar & District Registrar roles in Queensland and Western Australia because it has nothing to do with the essential District Registrar role in one of the District Registries of the Federal Court of Australia**, <sup>999</sup> was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated Executive Level 2 classifications for the purposes of **rule 9** of the *Public Service Classification Rules 2000* (Cth) (i.e. a role review).

[1016] But so far as Mark Anstey is concerned, a notation left by the Agency Head on the “Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia” proposing to allocate Executive Level 2 classifications to Murray Belcher and Russell Trott is proof positive that the Senior Executive Band 1 classified National Judicial Registrar role, ***which is entirely different and distinct to the National Judicial Registrar & District Registrar roles in Queensland and Western Australia*** (distinct because the Chief Executive Officer is obligated, under section 34(3) of the *Federal Court of Australia Act 1976* (Cth), to ensure that there is a District Registrar resident in each State of the Federation, and because the National Judicial Registrar role is entirely discretionary and not the District Registrar of District Registry of the Federal Court), was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated an Executive Level 2 classification for the purposes of ***rule 9*** of the *Public Service Classification Rules 2000* (Cth) (i.e. the subject of a “role review”).

[1017] Mark Anstey’s reasoning is manifestly absurd; it is sheer idiocy.

[1018] There is no logically probative or relevant evidence [1000](#) that demonstrates that the Senior Executive Band 1 classified National Judicial Registrar role, which is entirely different and distinct to the National Judicial Registrar & District Registrar roles in Queensland and Western Australia was, in light of the work value of the group of duties described in the work level standards and a proper job analysis, ever reclassified and allocated an Executive Level 2 classification for the purposes of rule 9 of the Public Service Classification Rules 2000. Freedom of information decision makers in the Federal Court of Australia have, publicly and beyond a shadow of a doubt, put that to rest.

[1019] Even the Australian Public Service Commission’s General Counsel acknowledges that the “Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia”, which is the only document that bears written notes recorded by the Agency Head of the Federal Court of Australia Statutory Agency, is not a role review document. [1001](#)

[1020] Despite all of what has been demonstrated, Mark Anstey insists that “[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented.” Moreover, he refuses to identify the “documented” item of evidence which he relies on to conclude that it was “reasonably open to the PID Investigator to have concluded that there was a review conducted.”

[1021] ***There never was a role review of the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Queensland.***

[1022] ***There never was a role review of the Senior Executive Band 1 classified National Judicial Registrar & District Registrar role in Western Australia.***

[1023] ***There never was a role review of the Senior Executive Band 1 National Judicial Registrar role in the Federal Court.***

[1024] ***There is no documented decision on the part of the Agency Head that “it was appropriate and necessary for some positions to be held at EL2 level.”***

[1025] There is only a documented notation, left by the Agency Head on the “Judicial Registrar Recruitment Outcome document prepared by the Federal Court of Australia”, that Murray Belcher and Russell Trott were to be unlawfully allocated Executive Level 2 (i.e. Legal 2) classifications, pursuant to **rule 6** of the *Public Service Classification Rules 2000* (Cth), so that the Senior Executive Band 1 classifications that they should have been allocated, having been selected for promotion to the Senior Executive Band 1 National Judicial Registrar & District Registrar roles on their merits, could be “transferred” to Sydney and allocated to Susan O’Connor and Drew Pearson – two people who did not apply for the Senior Executive Band 1 National Judicial Registrar role (which was never notified in the Public Service Gazette, contrary to section 20 of the *Australian Public Service Commissioner’s Directions 2016* (Cth)) – pursuant to rule 6 of the *Public Service Classification Rules 2000* (Cth).

[1026] Mark Anstey’s finding that “[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented” is, for the reasons set out in excruciating detail for the Ombudsman’s finest, ***plainly wrong*** and, thus, unjustifiable.

#### *Ground 5*

[1027] I adopt the reasoning in paragraphs [378] – [393] of this email.

#### *Ground 6*

[1028] I adopt the reasoning in paragraphs [725] – [737] of this email.

## Ground 7

[1029] Mr Anstey stated that “[s]ections 25 and 26 of the *Public Service Act 1999* and section 46 of the Australian Public Service Commissioner’s Directions 2022 allow for a person to be moved ‘at level’ or to be assigned different duties, i.e. a different role, at level.” That finding or conclusion is both irrelevant to the situation and, as a matter of law, incorrect.

[1030] I will dispose of the reliance placed on section 26 of the *Public Service Act 1999* (Cth) and section 46 of the *Australian Public Service Commissioner’s Directions 2022* (Cth), before dealing with the application of section 25 of the *Public Service Act 1999* (Cth).

### A. Section 26 of the *Public Service Act 1999* (Cth)

[1031] Section 26 of the *Public Service Act 1999* (Cth) provides that the an Agency Head may enter into an agreement, in writing, with an APS employee for the employee to move to the Agency Head’s Agency from another Agency.

[1032] In other words, section 26 of the *Public Service Act 1999* (Cth) governs inter-agency transfers effected by written agreements between an Agency Head of an Agency, with an APS employee from a different Agency.

[1033] Phillip Allaway was already an APS employee affiliated with the Federal Court of Australia Statutory Agency at all relevant times. Phillip Allaway has been an APS employee affiliated with the Federal Court of Australia Statutory Agency since 3 October 2007, when he was engaged as an Executive Level 2 Deputy District Registrar. <sup>1002</sup> Section 26 has no application to Matthew Benter or the disclosable conduct relating to his engagement.

[1034] For that matter, section 26 of the *Public Service Act 1999* (Cth) has no application to a single one of:

a) Caitlin Wu;

- b) Rohan Muscat;
- c) Murray Belcher;
- d) Russell Trott;
- e) Susan O'Connor;
- f) Claire Gitsham;
- g) Matthew Benter;
- h) Rupert Burns; and / or
- i) Tuan Van Le,

because not a single one of these people were transferred into the Federal Court of Australia Statutory Agency from another Commonwealth Agency pursuant to a written agreement with the Agency Head of the Federal Court of Australia Statutory Agency.

[1035] Thus, section 26 of the *Public Service Act 1999* (Cth) has no application to these people or to the disclosable conduct relating to their engagements of “promotions”.

[1036] Therefore, Mr Anstey’s references to section 26 of the *Public Service Act 1999* (Cth) were pointless and irrelevant.

#### B. Section 46 of the *Australian Public Service Commissioner’s Directions 2022* (Cth)

[1037] I adopt the reasoning in paragraphs [746] – [748] of this email.

#### C. Section 25 of the *Public Service Act 1999* (Cth)

[1038] Section 25 of the *Public Service Act 1999* (Cth) provides that an Agency Head may from time to time determine the duties of **anAPS employee** in the Agency, and the place or places at which the duties are to be performed.

[1039] Naturally, the duties of **an APS employee** that the Agency Head determines must be duties that broadly fall within the contours of the groups of duties to which the Agency Head has allocated an approved classification to under **rule 9** of the *Public Service Classification Rules 2000* (Cth) because an Agency Head cannot rely on a provision that is about the duties of **an APS employee** to determine the groups of duties for a role, which is independent of the APS employee. In other words, the power available to an Agency Head under section 25 of the *Public Service Act 1999* (Cth) to determine the duties of an APS employee presupposes the existence of the role, which is the set of duties to which a classification has been allocated pursuant to section 23 of the *Public Service Act 1999* (Cth), and under **rule 9** of the *Public Service Classification Rules 2000* (Cth).

[1040] To the extent that Mark Anstey is suggesting, as he has, that an Agency Head may rely on section 25 of the *Public Service Act 1999* (Cth) to, at his or her “discretion” “determine the duties of an employee and determine an appropriate classification based on those duties”, for the reasons that I have already set out in paragraphs [317] – [318], that is, as a matter of law, complete nonsense.

[1041] A simple example will demonstrate just how misguided Mr Anstey’s reasoning is.

[1042] If, as Mark Anstey claims, “[section] 25 ... of the *Public Service Act 1999* (Cth) ... allow[s] for a person to be moved ‘at level’ or to be assigned different duties” in the sense that an Agency Head may, at his or her “discretion”, “determine the duties of an employee and determine an appropriate classification based on those duties”, then it would follow that the Agency Head of the Australian Taxation Office would be able to make an Executive Level 1 classified customer service team leader into:

a) an Executive Level 1 classified statistician; or

b) an Executive Level 1 classified actuary; or

c) an Executive Level 1 classified lawyer in the Australian Taxation Office,

without first establishing, based on the work value of the groups of duties [1003](#) (as described in the relevant work level standards), [1004](#) any one of those roles by allocating an approved classification to the groups of duties associated with those roles to the performed in the Agency. [1005](#)

[1043] But that is not how the *Public Service Act 1999* (Cth) works. Indeed, that is not how statutory interpretation works. Mark Anstey is not permitted to:

a) read words and concepts into section 25 of the *Public Service Act 1999* (Cth) that do not form part of that provision (e.g. claiming that an Agency Head may, at his or her “discretion”, “determine the duties of an employee and determine an appropriate classification based on those duties”);

b) entirely read down section 23 of the *Public Service Act 1999* (Cth);

c) entirely read down rule 9 of the *Public Service Classification Rules 2000* (Cth) (which have been made pursuant to rule 23 of the *Public Service Act 1999* (Cth)); and

d) ignore the *Australian Public Service Classification Guide*, which has been issued by the Australian Public Service Commissioner pursuant to functions and powers set out in section 41 of the *Public Service Act 1999* (Cth),

so that he can attempt to justify a preconceived conclusion (exculpating Kate McMullan for an inadequate investigation under the *Public Interest Disclosure Act 2013* (Cth)) because it would be far too inconvenient for the Office of the Commonwealth Ombudsman to deal with the consequences of a lawful determination of the way that Kate McMullan conducted her public interest disclosure investigation.

[1044] But do not take my word for it.

[1045] Here is the judgment of the plurality in the most cited case to have issued from the High Court of Australia in the last quarter century (and the second most cited case in the history of the High Court of Australia), *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 490:

The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a

whole". In *Commissioner for Railways (NSW) v Agalinos*, Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed.

A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court "to determine which is the leading provision and which the subordinate provision, and which must give way to the other". Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.

[1046] One must give effect to the provisions of the totality of a statute by harmonising the provisions of that statute so that the unity of the provisions is, so far as it is possible, given effect to.

[1047] Reading down provisions, introducing words and concepts into provisions, and ignoring the terms of provisions are not permissible when construing a statute as a whole. But what does Mark Anstey care? He feels himself perfectly at liberty to trash unanimous judgments of the High Court in respect of the disclosing material information used to make decisions adverse to my rights and entitlements. He feels himself perfectly at liberty to trash judgments of the High Court in respect of the retroactive application of legislation. So why not trash the High Court's classical judgment in *Project Blue Sky v Australian Broadcasting Authority*?

[1048] Clearly, Mark Anstey's claim that "[section] 25 ... of the *Public Service Act 1999* allow[s] for a person to be moved 'at level' or to be assigned different duties, i.e. a different role, at level" is, as a matter of law, wrong.

[1049] Clearly, Mark Anstey's claim that "[section] 25 ... of the *Public Service Act 1999* allow[s] for a person to be moved 'at level' or to be assigned different duties, i.e. a different role, at level" is inapplicable.

[1050] Clearly, Mark Anstey's claim that "[section] 25 ... of the *Public Service Act 1999* allow[s] for a person to be moved 'at level' or to be assigned different duties, i.e. a different role, at level" is irrelevant.

[1051] The fact is that Sia Lagos, in an act of cronyism, decided that it would be appropriate to award Phillip Allaway, a registrar who had served as a Deputy District Registrar in the Victoria District Registry while she was the District Registrar of the Victoria District Registry, [1006](#) with the “title” of National Judicial Registrar, a title that was, so far as the Judges and staff of the Federal Court were concerned, associated with groups of duties that had Senior Executive Band 1 classifications allocated to them under rule 9 of the *Public Service Classification Rules 2000* (Cth) (see, for example, the Senior Executive Band 1 classified National Judicial Registrar & District Registrar roles in the Victoria, Queensland and Western Australia District Registries of the Federal Court, [1007](#) the Senior Executive Band 1 classified National Judicial Registrar – Native Title role in the Federal Court, [1008](#) and the Senior Executive Band 1 classified National Judicial Registrar – Appeals role in the Federal Court [1009](#)).

[1052] As I have repeatedly proved, there never was a “role review” of the National Judicial Registrar role such that it was allocated an Executive Level 2 classification under rule 9 of the *Public Service Classification Rules 2000* (Cth). Why else would Darrin Moy, the human resources tsar of the Federal Court of Australia Statutory Agency, feel compelled to write to Mr Allaway on 23 November 2018 to note that “as discussed with Sia there is no formal appointment to a National Judicial Registrar role”, [1010](#) even though “you may commence your new title immediately”? [1011](#)

[1053] But, of course, Mark Anstey chooses to:

a) ignore the evidence that was before Kate McMullan in respect of the act patronage that saw Phillip Allaway handed the title of National Judicial Registrar, with an independent flexibility arrangement to sweeten the deal; [1012](#) and

b) ignore the evidence before him that demonstrates that Darrin Moy and Matt Asquith, Mr Moy’s Assistant Director of People and Culture in the Federal Court of Australia, shamelessly confess to the fact that the allocation of a classification to an APS employee under **rule 6** of the *Public Service Classification Rules 2000* (Cth) is “[t]he SES cap the Court has, and if the position can fit within the cap” [1013](#); and

c) ignore the evidence that was before him that shows that individual flexibility arrangements are used to supplement the incomes of “National Judicial Registrars”, like Phillip Allaway, Matthew Benter, Rupert Burns, Claire Gitsham, and Tuan Van Le, who have been allocated an Executive Level 2 classification under **rule 6** of the *Public Service Classification Rules 2000* (Cth), particularly where the work value for the groups of duties to be performed is “higher than” the work value of the groups of duties based on the Commissioner’s work level standards for the Executive Level 2 classification. [1014](#)

## Ground 8

[1054] I take issue with Mark Anstey's failure to address Ms McMullan's failure to investigate the allegation that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they handed a National Judicial Registrar role to Phillip Allaway, even though there had been no role evaluation for such a role, and for which there was no merit based selection process.

[1055] I have already proved that there was no evidence, before Kate McMullan, of a role evaluation for a National Judicial Registrar role that had, for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth), been allocated an Executive Level 2 classification.

[1056] I have already proved that there is no evidence of a role evaluation for a National Judicial Registrar role that had, for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth), been allocated an Executive Level 2 classification, independent of whether that evidence was before Kate McMullan during her public interest disclosure investigation.

[1057] I have already proved that administrators in the Federal Court of Australia allocate classifications to individuals, under **rule 6** of the *Public Service Classification Rules 2000* (Cth), for the National Judicial Registrar role based on "[t]he additional responsibilities on top of the core registrar work that the **SES employees** undertake" and the ability to "fit" that person into the Statutory Agency without transgressing the capped number of SES positions. [1015](#)

[1058] I have already shown that the Assistant Director of People and Culture in the Federal Court of Australia shamelessly admits that individual flexibility arrangements are used to supplement the incomes of National Judicial Registrars who have been allocated an Executive Level 2 classification under **rule 6** of the *Public Service Classification Rules 2000* (Cth), particularly where the work value for the groups of duties to be performed is "higher than" the work value of the groups of duties based on the Commissioner's work level standards for the Executive Level 2 classification. [1016](#) And I have already shown that Matt Asquith flatly and shameless admits, "[t]his is often the case given that the agency has an SES Cap of 21." [1017](#)

[1059] As I pointed out in my complaint to the Office of the Commonwealth Ombudsman, which Mark Anstey "investigated", there was no evidence before Ms McMullan that, among other things: [1018](#)

a) an Executive Level 2 classified National Judicial Registrar vacancy had been notified in the Public Service Gazette and, as a consequence, that the vacancy was notified as open to all eligible members of the community;

b) any applications were received for an Executive Level 2 classified National Judicial Registrar vacancy that Phillip Allaway was engaged to fill; and

c) the aim and purpose of the selection process for the Executive Level 2 National Judicial Registrar role in the Victoria District Registry of the Federal Court had been determined in advance.

[1060] In response to a freedom of information request for access to “the vacancy notice for the National Judicial Registrar role, published in the Public Service Gazette or elsewhere, that Phillip Allaway applied for and was selected to fill”, [1019](#) National Judicial Registrar & District Registrar Nicola Colbran refused to provide access to the document, pursuant to section 24A of the *Freedom of Information Act 1982* (Cth), because the document does not exist. [1020](#)

[1061] In response to a freedom of information request for access to the “the job application submitted for the National Judicial Registrar role that Phillip Allaway was selected to fill” [1021](#) National Judicial Registrar & District Registrar Nicola Colbran refused to provide access to the document, pursuant to section 24A of the *Freedom of Information Act 1982* (Cth), because the document does not exist or cannot be found. [1022](#)

[1062] Despite the fact that:

a) I have proved that there was no evidence, before Kate McMullan, of a role evaluation for a National Judicial Registrar role that had, for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth), been allocated an Executive Level 2 classification; and

b) I have proved that there is no evidence of a role evaluation for a National Judicial Registrar role that had, for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth), been allocated an Executive Level 2 classification, independent of whether that evidence was before Kate McMullan during her public interest disclosure investigation; and

c) I have proved that, contrary to the legislative requirements set out in section 20 of the *Australian Public Service Commissioner's Guidelines 2016* (Cth) (which provides that a vacancy must be notified in order to meet the requirements for merit-based selection), no vacancy notice for the National Judicial Registrar role that Phillip Allaway was handed was published in the Public Service Gazette or elsewhere,<sup>[1023](#)</sup> and

d) I have proved that there is no evidence that Phillip Allaway submitted a job application for the National Judicial Registrar role that he was handed,<sup>[1024](#)</sup>

Mark Anstey concluded that the allegations that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they handed Phillip Allaway a National Judicial Registrar role for which there had been no role evaluation, and for which there was no merit based selection process were not substantiated because he “found that most of the key findings [that Kate McMullan made] were not unreasonable for the Investigating Agency to make.”<sup>[1025](#)</sup>

[1063] Ms McMullan’s failure to address the allegations demonstrates the inadequacy of public interest disclosure investigation. It was not appropriate for Mr Anstey to terminate his investigation into Ms McMullan’s failure to address the allegation without providing something more than “I found that most of the key findings [that Kate McMullan made] were not unreasonable for the Investigating Agency to make” particularly because I have proved (even though it is emphatically not my duty to prove any of the matters identified) that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they handed Phillip Allaway a National Judicial Registrar role, with an independent flexibility arrangement:

a) so as to cheat the capped number of SES positions available to the Federal Court of Australia Statutory Agency; and

b) for which there had been no role evaluation; and

c) for which there was no merit based selection process.

[1064] Plainly, Mark Anstey’s findings reflect the terminally confused and misinformed state of his mind.

*Relief sought*

[1065] I request that:

a) Mr Anstey's decision to terminate the investigation under the *Ombudsman Act 1976* (Cth) be set aside on the basis of the grounds of review articulated above (both general and specific);

b) the Ombudsman make a finding that Kate McMullan's finding that "[t]he evidence provided indicates that as a result of a role review, a determination was made that NJR positions could be held at the SESB1 level in some registrars, and at the Legal 2 level in other registrars" was not based on evidence;

c) the Ombudsman make a finding that Kate McMullan's finding that "[t]he evidence provided indicates that as a result of a role review, a determination was made that NJR positions could be held at the SESB1 level in some registrars, and at the Legal 2 level in other registrars" was not based on any evidence available to her;

d) the Ombudsman make a finding that Kate McMullan's finding in respect of the National Judicial Registrar roles, which was "a role review process ... had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load" is not justifiable and is, thus, wrong because, first, it is not permissible to classify or reclassify a role on the basis of the workload of the role, and, second, there was not evidence before Ms McMullan, and there is actually no evidence simpliciter, that there ever was a "role review process" such that the National Judicial Registrar role had been allocated an Executive Level 2 classification for the purposes of **rule 9** of the *Public Service Classification Rules 2000* (Cth);

e) the Ombudsman make a finding that Kate McMullan contravened her statutory duty, under the *Public Interest Disclosure Act 2013* (Cth), by functionally refusing to investigate the disclosable conduct that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct by handing out an Executive Level 2 classification to Phillip Allaway under **rule 6** of the *Public Service Classification Rules 2000* (Cth) i) for a role that had never been allocated an Executive Level 2 classification under **rule 9** of the *Public Service Classification Rules 2000* (Cth); and ii) for a role that had never been the subject of a vacancy notification, which notified the Australian community that there was a role that eligible members of the community would be permitted to apply for;

f) the Ombudsman make a finding that Kate McMullan contravened her statutory duty, under the *Public Interest Disclosure Act 2013* (Cth), by functionally refusing to investigate the disclosable conduct that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct by handing out Executive Level 2 classifications to individuals like Phillip Allaway, under **rule 6** of the *Public Service Classification Rules 2000* (Cth) with the stated purpose of cheating the capped number of SES positions available to the Federal Court of Australia Statutory Agency;

g) the Ombudsman make a finding that Kate McMullan failed to comply with procedures established under subsection 15(3) of the *Public Service Act 1999* (Cth) in investigating alleged breaches of the Code of Conduct and had thus failed to comply with paragraph 53(5)(b) of the *Public Interest Disclosure Act 2013* (Cth);

h) the Ombudsman prepare a report of his findings, and refer the matter back to the Australian Public Service Commissioner with a recommendation that the Commissioner reinvestigate the public interest disclosure according to law.

## **9. THE DECISION TO HAND RUPERT BURNS A NATIONAL JUDICIAL REGISTRAR ROLE**

### Findings and outcomes of Kate McMullan's investigation under the *Public Interest Disclosure Act 2013* (Cth)

[1066] The investigator, Kate McMullan, made several findings, but there was one essential finding.

[1067] In response to the allegation that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they held out Rupert Burns as a National Judicial Registrar (a role for which there had been no role evaluation, and for which there was no merit based selection process), Ms McMullan made the following finding:

The relevant allegation is that Mr Allaway, Mr Burns and Mr Le were appointed to ... positions without proper process, or are being “held out” as ... officers when they were not appointed as such ...

None of the three was promoted to an SES1 NJR; they remained in Legal 2 positions with a change in title. As discussed earlier, as part of a broader review of roles in the FCA it is evident that NJR roles can be held at either the Legal 2 level or the SESB1 level. [1026](#)

Errors alleged to have been committed by Kate McMullan in complaint lodged with the Office of the Commonwealth Ombudsman on 26 October 2021

[1068] Ms McMullan made many errors but there were two fundamental errors, and a derivative error.

[1069] First, in order for Ms McMullan's finding that "as part of a broader review of roles in the FCA it is evident that NJR roles can be held at either the Legal 2 level or the SESB1 level" to be correct, it must be the case that a role review of a Senior Executive Band 1 classified National Judicial Registrar role, as distinct to the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – QLD role and the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – WA role, [1027](#) was undertaken. [1028](#) There was no evidence before Ms McMullan demonstrating that a role review had taken place such that the groups of duties associated with the National Judicial Registrar role had been allocated an Executive Level 2 classification. [1029](#)

[1070] Second, in order for Rupert Burns to have been lawfully engaged to fill an Executive Level 2 National Judicial Registrar role in the Victoria District Registry of the Federal Court on an ongoing, full-time basis, and in order for Kate McMullan to have concluded that Rupert Burns was selected according to a merit based selection process (and not the mere caprice of Sia Lagos, who has a history of engaging in cronyism and patronage), it was, among other things, necessary: [1030](#)

a) for the vacancy, or a similar vacancy, in the Federal Court of Australia to be notified in the Public Service Gazette within a period of 12 months before the written decision to engage Mr Benter; [1031](#) and

b) for the vacancy to have been notified as open to all eligible members of the community; [1032](#) and

c) for the aim and purpose of the selection process for the Executive Level 2 National Judicial Registrar role in the Victoria District Registry of the Federal Court to have been determined in advance; [1033](#) and

d) for information about the selection process for the Executive Level 2 National Judicial Registrar role in the Victoria District Registry of the Federal Court to have been readily available to applicants;<sup>1034</sup> and

e) for the selection process for the Executive Level 2 National Judicial Registrar role in the Victoria District Registry of the Federal Court to be appropriately documented. <sup>1035</sup>

[1071] Aside from the fact that there was no evidence before Ms McMullan that a role evaluation had been conducted for a National Judicial Registrar role which had been allocated an Executive Level 2 classification, there was no evidence before Ms McMullan that, among other things: <sup>1036</sup>

a) an Executive Level 2 classified National Judicial Registrar vacancy had been notified in the Public Service Gazette and, as a consequence, that the vacancy was notified as open to all eligible members of the community;

b) any applications were received for an Executive Level 2 classified National Judicial Registrar vacancy that Mr Burns was engaged to fill; and

c) the aim and purpose of the selection process for the Executive Level 2 National Judicial Registrar role in the Victoria District Registry of the Federal Court had been determined in advance.

[1072] That Ms McMullan found that there was “no disclosable conduct in regard to the change in position/title in regard to Mr Allaway, Mr Burns and Mr Le”, even though there was no evidence before Ms McMullan that:

a) a role review had taken place such that the National Judicial Registrar role had been allocated an Executive Level 2 classification for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth); and

b) Rupert Burns was selected to fill a National Judicial Registrar role bearing an Executive Level 2 classification in the course of a merit-based selection process (rather than merely being rewarded for his loyalty to Sia Lagos in an act of patronage and cronyism),

demonstrates that Ms McMullan had failed, as part of her public interest disclosure investigation, to ascertain whether Rupert Burns had been engaged according to law and that, accordingly, Ms McMullan's finding that "I find no disclosable conduct in regard to the change in position/title in regard to Mr Allaway, Mr Burns and Mr Le" was made on something other than logically probative and relevant evidence.<sup>[1037](#)</sup>

[1073] Third, being the derivative error, Ms McMullan's conclusion that the National Judicial Registrar could bear both an Executive Level 2 and Senior Executive Band 1 classification on no basis other than the relative work load and complexity of the work undertaken would mean that Ms McMullan was suggesting that a **constructive** broadbanding arrangement across a Senior Executive Band classification were permissible, even though it is explicitly prohibited under rule 9(5) of the *Public Service Classification Rules 2000* (Cth).<sup>[1038](#)</sup>

#### Findings and outcomes of the investigation conducted by the Office of the Commonwealth Ombudsman

[1074] On 12 December 2022, Mark Anstey, an acting Assistant Director in the Public Interest Disclosure Team of the Ombudsman's Office, terminated an investigation, under the *Ombudsman Act 1976* (Cth), into the errors alleged to have been committed by Ms McMullan.<sup>[1039](#)</sup>

[1075] Mr Anstey claimed that the Ombudsman "cannot take any action that would cause an agency to reinvestigate a [public interest disclosure] ... because the [Public Interest Disclosure Act 2013 (Cth)] does not provide a mechanism for a finalised PID investigation to be reopened."<sup>[1040](#)</sup> The falsehood of that legal proposition has been part IV of this email.

[1076] Mr Anstey claimed "most of the key findings were not unreasonable for the investigating agency to make."<sup>[1041](#)</sup> That proposition is false, not least for the reasons set out in part XI of this email. Further reasons demonstrating the falsehood of that proposition will be set out below.

[1077] Mr Anstey concluded that "there is no practical outcome [the Ombudsman] could obtain by further investigating the complaint", which, as I have demonstrated in part V of this email, is a falsehood, and, on that basis, terminated the investigation into the errors alleged to have been committed by Ms McMullan.<sup>[1042](#)</sup>

[1078] In terminating the investigation, Mr Anstey stated: [1043](#)

I understand your view that there was not a properly documented review of roles and classifications that would allow an Agency Head to appoint individuals to the relevant position at SES1 or EL2 level.

Conducting and documenting a role review is not set down in legislation. The APS Classification Guide recommends a role review or role evaluation be carried out in certain circumstances, including reviews conducted because of a restructure or reorganisation within an agency. That said, ultimately it is at the discretion of the Agency Head to determine the duties of an employee and determine an appropriate classification based on those duties.

The PID Investigator concluded the material available indicated there had been a role review and the decision to reclassify these positions was made “*on the basis of the relative volume and complexity of work undertaken in the various registrars (sic)*”. I accept that you dispute this. I also appreciate the reasons for the decision could have been better communicated to agency staff, as the PID Investigator noted, and similarly the internal records could have been more detailed. It nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented.

[1079] Mr Anstey also stated: [1044](#)

I note your view the PID Investigator failed to address a key legal issue at the start of the investigation – this being the holding of a role at SES1 and EL2 classifications. As I understand it, you were concerned the implication of the PID investigation report was that “*it is acceptable for broadbanding arrangements to extend to SES classification*”. As you noted, there is no broadbanding between EL classifications and SES ...

While I acknowledge your views, what happened in this case does not appear to be a case of unlawful broadbanding – this being broadbanding between EL and SES classifications. In your complaint you said the records indicated a “*proposition that the ... role could bear a classification of both Executive Level 2 and SES Band 1*”. In my view, it appears the agency decided the position could have a classification of *either* EL2 or SES, depending on the requirements of the specific role ...

The arrangements the agency put in place for several appointees did not allow individuals appointed to the positions at EL2 level via an individual flexibility arrangement (IFA) to progress to the SES level without the need for an open, competitive selection process. As the Investigator noted, a decision was made that “*the NJR positions could be held at the SESB1 level in some registrars (sic), and at the Legal 2 level in other registrars (sic)*” due to an assessment about the differing volume and complexity of work in each registry. This does not appear to be a case of unlawful broadbanding. I accept the report could have provided more

detail about how this alleged issue was assessed. However, the PID Investigator did not fail to identify and consider the issue.

Related to the PID Investigator's alleged failure to properly consider this alleged unlawful broadbanding was your complaint the recruitment process inappropriately sought to avoid a cap that may have been placed on the number of positions to be offered at each level. In my view, when caps are in place – whether at SES or APS level – it is open to an agency to use an IFA to attract or retain talent if this meets a genuine operational need of the agency. Such a practice would not be a case of 'getting around' a cap in the sense of frustrating the underlying purpose of a cap, which is to limit the number of permanent employees at particular level. Unlike the entitlements that attach to permanent appointments to the APS a person's IFA can be terminated at any time, including if it ceases to meet a genuine operational need. This is consistent with the accepted practice that agencies can use labour hire staff to meet genuine operational needs at considerably higher cost than permanent or non-ongoing staff so long as these actions are commensurate with relevant requirements under the *Public Governance, Performance and Accountability Act* (the PGPA Act).

I understand you were also concerned that some individuals who applied for a position at SES level were subsequently appointed to positions at EL2 level. In my view, it was reasonably open to the PID Investigator to not make a finding of disclosable conduct relating to the decision and decision-making process that led to appointing these individuals to positions at EL2 level. This is because it appears that relevant individuals were already employed by the agency at EL2 level. Sections 25 and 26 of the *Public Service Act 1999* and section 46 of the Australian Public Service Commissioner's Directions 2002 allow for a person to be moved 'at level' or to be assigned different duties, i.e. a different role, at level. This provides agencies with the ability to move people into a different role, at level. In my view, it was open to the PID Investigator to not make a finding of disclosable conduct relating to the decision and decision-making process that led to existing substantive EL2 staff being moved 'at level' to a different role at the same EL2 level.

#### Grounds of review in respect of the decision to terminate the Ombudsman's investigation

[1080] The complaint in respect of broadbanding had plainly been too subtle for Mr Anstey to follow; Mr Anstey has missed the point. Naturally, "arrangements the agency put in place for several appointees did not allow individuals appointed to the positions at EL2 level via an individual flexibility arrangement (IFA) to progress to the SES level without the need for an open, competitive selection process" because the National Judicial Registrar role had never been allocated an Executive Level 2 classification under **rule 9** of the *Public Service Classification Rules 2000* (Cth). I was not suggesting that an *explicit* broadbanding arrangement had been effected; it would be impossible to effect an explicit broadbanding arrangement where the National Judicial Registrar role had **never** been the subject of a role review, such that an Executive Level 2 classification was allocated to the National Judicial Registrar role pursuant to **rule 9** of the *Public Service Classification Rules 2000* (Cth).

[1081] Rather, Ms McMullan’s conclusion that the National Judicial Registrar could bear both an Executive Level 2 and Senior Executive Band 1 classification on no basis other than the relative work load and complexity of the work undertaken would mean that Ms McMullan was suggesting that a **constructive** broadbanding arrangement across a Senior Executive Band classification were permissible, even though it is explicitly prohibited under rule 9(5) of the *Public Service Classification Rules 2000* (Cth). Of course, as has already been noted in part VIII of this review application, work load can never be a ground for allocating a particular classification to a group of duties and, by force of logic, can never be relevant to a broadbanding arrangement.

[1082] The complaint about *constructive* broadbanding is ultimately a derivative issue and, as such, will not be pressed in the grounds of review.

[1083] The complaint about constructive broadbanding is derivative because it presupposes that the National Judicial Registrar role was the subject of a role re-evaluation (i.e. a role review) such that, following a lawful review, an Executive Level 2 classification was allocated to the National Judicial Registrar role, for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth), on the basis that “*the NJR positions could be held at the SESB1 level in some registrars (sic), and at the Legal 2 level in other registrars (sic)*’ due to an assessment about the differing volume and complexity of work in each registry.”

[1084] While it is difficult to prove a negative, I will demonstrate that there never was a role review and, as such, there was no evidentiary basis for finding that “*the NJR positions could be held at the SESB1 level in some registrars (sic), and at the Legal 2 level in other registrars (sic)*’ due to an assessment about the differing volume and complexity of work in each registry.”

[1085] My grounds of review are as follows:

1) Mr Anstey’s claim that “[t]he APS Classification Guide *recommends* a role review or role evaluation be carried out in certain circumstances ...” is false;

2) Mr Anstey’s claim that “[c]onducting and documenting a role review is not set down in legislation” is stunted and misinformed because the legal obligation to conduct and document a role review is legislatively mandated;

3) Mr Anstey’s claim that “ultimately it is at the discretion of the Agency Head to determine the duties of an employee and determine an appropriate classification based on those duties” is false;

4) Mr Anstey's claim that "[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented" is unjustifiable;

5) The fact that Mr Anstey was unperturbed by Ms McMullan's finding that a "decision to reclassify these positions was made *on the basis of the relative volume and complexity of work undertaken in the various registrars (sic)*" demonstrates a failure on Mr Anstey's part to understand how classification decisions are to be made;

6) Mr Anstey's claims about the "SES cap" are, in the light of the evidence, misinformed;

7) Mr Anstey's claim that "[s]ections 25 and 26 of the *Public Service Act 1999* and section 46 of the Australian Public Service Commissioner's Directions 2022 allow for a person to be moved 'at level' or to be assigned different duties, i.e. a different role, at level" is irrelevant and incorrect; and

8) Mr Anstey's failure to address Ms McMullan's failure to investigate the allegation that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they handed Rupert Burns a National Judicial Registrar role for which there had been no role evaluation, and for which there was no merit based selection process.

#### *Ground 1*

[1086] I adopt the reasoning in paragraphs [292] – [301] in this email.

#### *Ground 2*

[1087] I adopt the reasoning in paragraphs [302] – [314] in this email.

### *Ground 3*

[1088] I adopt the reasoning in paragraphs [315] – [318] in this email.

### *Ground 4*

[1089] I adopt, *mutatis mutandis*, the reasoning in paragraphs [950] – [1026] of this email. If you do not understand what it means to adopt reasoning *mutatis mutandis*, or are incapable of doing so, please let me know in advance of making a decision so that I will not have to grapple with yet another stupid decision.

### *Ground 5*

[1090] I adopt the reasoning in paragraphs [378] – [393] of this email.

### *Ground 6*

[1091] I adopt the reasoning in paragraphs [725] – [737] of this email.

### *Ground 7*

[1092] Mr Anstey stated that “[s]ections 25 and 26 of the *Public Service Act 1999* and section 46 of the Australian Public Service Commissioner’s Directions 2022 allow for a person to be moved ‘at level’ or to be assigned different duties, i.e. a different role, at level.” That finding or conclusion is both irrelevant to the situation and, as a matter of law, incorrect.

[1093] I will dispose of the reliance placed on section 26 of the *Public Service Act 1999* (Cth) and section 46 of the *Australian Public Service Commissioner’s Directions 2022* (Cth), before dealing with the application of section 25 of the *Public Service Act 1999* (Cth).

A. Section 26 of the *Public Service Act 1999* (Cth)

[1094] I adopt, *mutatis mutandis*, the reasoning in paragraphs [1031] – [1036] of this email. If you do not understand what it means to adopt reasoning *mutatis mutandis*, or are incapable of doing so, please let me know in advance of making a decision so that I will not have to grapple with yet another stupid decision.

B. Section 46 of the *Australian Public Service Commissioner's Directions 2022* (Cth)

[1095] I adopt the reasoning in paragraphs [746] – [748] of this email.

C. Section 25 of the *Public Service Act 1999* (Cth)

[1096] I adopt, *mutatis mutandis*, the reasoning in paragraphs [1038] – [1053] of this email. If you do not understand what it means to adopt reasoning *mutatis mutandis*, or are incapable of doing so, please let me know in advance of making a decision so that I will not have to grapple with yet another stupid decision.

*Ground 8*

[1097] I adopt, *mutatis mutandis*, the reasoning in paragraphs [1054] – [1064] of this email. If you do not understand what it means to adopt reasoning *mutatis mutandis*, or are incapable of doing so, please let me know in advance of making a decision so that I will not have to grapple with yet another stupid decision.

*Relief sought*

[1098] I request that:

a) Mr Anstey's decision to terminate the investigation under the *Ombudsman Act 1976* (Cth) be set aside on the basis of the grounds of review articulated above (both general and specific);

b) the Ombudsman make a finding that Kate McMullan's finding that "[t]he evidence provided indicates that as a result of a role review, a determination was made that NJR positions could be held at the SESB1 level in some registrars, and at the Legal 2 level in other registrars" was not based on evidence;

c) the Ombudsman make a finding that Kate McMullan's finding that "[t]he evidence provided indicates that as a result of a role review, a determination was made that NJR positions could be held at the SESB1 level in some registrars, and at the Legal 2 level in other registrars" was not based on any evidence available to her;

d) the Ombudsman make a finding that Kate McMullan's finding in respect of the National Judicial Registrar roles, which was "a role review process ... had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load" is not justifiable and is, thus, wrong because, first, it is not permissible to classify or reclassify a role on the basis of the workload of the role, and, second, there was not evidence before Ms McMullan, and there is actually no evidence simpliciter, that there ever was a "role review process" such that the National Judicial Registrar role had been allocated an Executive Level 2 classification for the purposes of **rule 9** of the *Public Service Classification Rules 2000* (Cth);

e) the Ombudsman make a finding that Kate McMullan contravened her statutory duty, under the *Public Interest Disclosure Act 2013* (Cth), by functionally refusing to investigate the disclosable conduct that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct by handing out an Executive Level 2 classification to Rupert Burns under **rule 6** of the *Public Service Classification Rules 2000* (Cth) i) for a role that had never been allocated an Executive Level 2 classification under **rule 9** of the *Public Service Classification Rules 2000* (Cth); and ii) for a role that had never been the subject of a vacancy notification, which notified the Australian community that there was a role that eligible members of the community would be permitted to apply for;

f) the Ombudsman make a finding that Kate McMullan contravened her statutory duty, under the *Public Interest Disclosure Act 2013* (Cth), by functionally refusing to investigate the disclosable conduct that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct by handing out Executive Level 2 classifications to individuals like Rupert Burns, under **rule 6** of the *Public Service Classification Rules 2000* (Cth) with the stated purpose of cheating the capped number of SES positions available to the Federal Court of Australia Statutory Agency;

g) the Ombudsman make a finding that Kate McMullan failed to comply with procedures established under subsection 15(3) of the *Public Service Act 1999* (Cth) in investigating alleged breaches of the Code of Conduct and had thus failed to comply with paragraph 53(5)(b) of the *Public Interest Disclosure Act 2013* (Cth);

h) the Ombudsman prepare a report of his findings, and refer the matter back to the Australian Public Service Commissioner with a recommendation that the Commissioner reinvestigate the public interest disclosure according to law.

## **10. THE DECISION TO HAND TUAN VAN LE A NATIONAL JUDICIAL REGISTRAR ROLE**

### Findings and outcomes of Kate McMullan's investigation under the *Public Interest Disclosure Act 2013* (Cth)

[1099] The investigator, Kate McMullan, made several findings, but there was one essential finding.

[1100] In response to the allegation that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they held out Tuan Van Le as a National Judicial Registrar (a role for which there had been no role evaluation, and for which there was no merit based selection process), Ms McMullan made the following finding:

The relevant allegation is that Mr Allaway, Mr Burns and Mr Le were appointed to ... positions without proper process, or are being “held out” as ... officers when they were not appointed as such ...

None of the three was promoted to an SES1 NJR; they remained in Legal 2 positions with a change in title. As discussed earlier, as part of a broader review of roles in the FCA it is evident that NJR roles can be held at either the Legal 2 level or the SESB1 level. [1045](#)

### Errors alleged to have been committed by Kate McMullan in complaint lodged with the Office of the Commonwealth Ombudsman on 26 October 2021

[1101] Ms McMullan made many errors but there were two fundamental errors, and a derivative error.

[1102] First, in order for Ms McMullan's finding that "as part of a broader review of roles in the FCA it is evident that NJR roles can be held at either the Legal 2 level or the SESB1 level" to be correct, it must be the case that a role review of a Senior Executive Band 1 classified National Judicial Registrar role, as distinct to the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – QLD role and the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – WA role, [1046](#) was undertaken. [1047](#) There was no evidence before Ms McMullan demonstrating that a role review had taken place such that the groups of duties associated with the National Judicial Registrar role had been allocated an Executive Level 2 classification. [1048](#)

[1103] Second, in order for Tuan Van Le to have been lawfully engaged to fill an Executive Level 2 National Judicial Registrar role in the Victoria District Registry of the Federal Court on an ongoing, full-time basis, and in order for Kate McMullan to have concluded that Tuan Van Le was selected according to a merit based selection process (and not the mere caprice of Sia Lagos, who has a history of engaging in cronyism and patronage), it was, among other things, necessary: [1049](#)

a) for the vacancy, or a similar vacancy, in the Federal Court of Australia to be notified in the Public Service Gazette within a period of 12 months before the written decision to engage Mr Benter; [1050](#) and

b) for the vacancy to have been notified as open to all eligible members of the community; [1051](#) and

c) for the aim and purpose of the selection process for the Executive Level 2 National Judicial Registrar role in the Victoria District Registry of the Federal Court to have been determined in advance; [1052](#) and

d) for information about the selection process for the Executive Level 2 National Judicial Registrar role in the Victoria District Registry of the Federal Court to have been readily available to applicants; [1053](#) and

e) for the selection process for the Executive Level 2 National Judicial Registrar role in the Victoria District Registry of the Federal Court to be appropriately documented. [1054](#)

[1104] Aside from the fact that there was no evidence before Ms McMullan that a role evaluation had been conducted for a National Judicial Registrar role which had been allocated an Executive Level 2 classification, there was no evidence before Ms McMullan that, among other things: [1055](#)

a) an Executive Level 2 classified National Judicial Registrar vacancy had been notified in the Public Service Gazette and, as a consequence, that the vacancy was notified as open to all eligible members of the community;

b) any applications were received for an Executive Level 2 classified National Judicial Registrar vacancy that Tuan Van Le was engaged to fill; and

c) the aim and purpose of the selection process for the Executive Level 2 National Judicial Registrar role in the Victoria District Registry of the Federal Court had been determined in advance.

[1105] That Ms McMullan found that there was “no disclosable conduct in regard to the change in position/title in regard to Mr Allaway, Mr Burns and Mr Le”, even though there was no evidence before Ms McMullan that:

a) a role review had taken place such that the National Judicial Registrar role had been allocated an Executive Level 2 classification for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth); and

b) Tuan Van Le was selected to fill a National Judicial Registrar role bearing an Executive Level 2 classification in the course of a merit-based selection process (rather than merely being rewarded for his loyalty to Sia Lagos in an act of patronage and cronyism),

demonstrates that Ms McMullan had failed, as part of her public interest disclosure investigation, to ascertain whether Tuan Van Le had been engaged according to law and that, accordingly, Ms McMullan’s finding that “I find no disclosable conduct in regard to the change in position/title in regard to Mr Allaway, Mr Burns and Mr Le” was made on something other than logically probative and relevant evidence. [1056](#)

[1106] Third, being the derivative error, Ms McMullan’s conclusion that the National Judicial Registrar could bear both an Executive Level 2 and Senior Executive Band 1 classification on no basis other than the relative work load and complexity of the work undertaken would mean that Ms McMullan was suggesting that a **constructive** broadbanding arrangement across a Senior Executive Band classification were permissible, even though it is explicitly prohibited under rule 9(5) of the *Public Service Classification Rules 2000* (Cth). [1057](#)

#### Findings and outcomes of the investigation conducted by the Office of the Commonwealth Ombudsman

[1107] On 12 December 2022, Mark Anstey, an acting Assistant Director in the Public Interest Disclosure Team of the Ombudsman’s Office, terminated an investigation, under the *Ombudsman Act 1976* (Cth), into the errors alleged to have been committed by Ms McMullan. [1058](#)

[1108] Mr Anstey claimed that the Ombudsman “cannot take any action that would cause an agency to reinvestigate a [public interest disclosure] ... because the [Public Interest Disclosure Act 2013 (Cth)] does not provide a mechanism for a finalised PID investigation to be reopened.” [1059](#) The falsehood of that legal proposition has been part IV of this email.

[1109] Mr Anstey claimed “most of the key findings were not unreasonable for the investigating agency to make.” [1060](#) That proposition is false, not least for the reasons set out in part XI of this email. Further reasons demonstrating the falsehood of that proposition will be set out below.

[1110] Mr Anstey concluded that “there is no practical outcome [the Ombudsman] could obtain by further investigating the complaint”, which, as I have demonstrated in part V of this email, is a falsehood, and, on that basis, terminated the investigation into the errors alleged to have been committed by Ms McMullan. [1061](#)

[1111] In terminating the investigation, Mr Anstey stated: [1062](#)

I understand your view that there was not a properly documented review of roles and classifications that would allow an Agency Head to appoint individuals to the relevant position at SES1 or EL2 level.

Conducting and documenting a role review is not set down in legislation. The APS Classification Guide recommends a role review or role evaluation be carried out in certain

circumstances, including reviews conducted because of a restructure or reorganisation within an agency. That said, ultimately it is at the discretion of the Agency Head to determine the duties of an employee and determine an appropriate classification based on those duties.

The PID Investigator concluded the material available indicated there had been a role review and the decision to reclassify these positions was made “*on the basis of the relative volume and complexity of work undertaken in the various registrars (sic)*”. I accept that you dispute this. I also appreciate the reasons for the decision could have been better communicated to agency staff, as the PID Investigator noted, and similarly the internal records could have been more detailed. It nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented.

[1112] Mr Anstey also stated: [1063](#)

I note your view the PID Investigator failed to address a key legal issue at the start of the investigation – this being the holding of a role at SES1 and EL2 classifications. As I understand it, you were concerned the implication of the PID investigation report was that “*it is acceptable for broadbanding arrangements to extend to SES classification*”. As you noted, there is no broadbanding between EL classifications and SES ...

While I acknowledge your views, what happened in this case does not appear to be a case of unlawful broadbanding – this being broadbanding between EL and SES classifications. In your complaint you said the records indicated a “*proposition that the ... role could bear a classification of both Executive Level 2 and SES Band 1*”. In my view, it appears the agency decided the position could have a classification of *either* EL2 or SES, depending on the requirements of the specific role ...

The arrangements the agency put in place for several appointees did not allow individuals appointed to the positions at EL2 level via an individual flexibility arrangement (IFA) to progress to the SES level without the need for an open, competitive selection process. As the Investigator noted, a decision was made that “*the NJR positions could be held at the SESB1 level in some registrars (sic), and at the Legal 2 level in other registrars (sic)*” due to an assessment about the differing volume and complexity of work in each registry. This does not appear to be a case of unlawful broadbanding. I accept the report could have provided more detail about how this alleged issue was assessed. However, the PID Investigator did not fail to identify and consider the issue.

Related to the PID Investigator’s alleged failure to properly consider this alleged unlawful broadbanding was your complaint the recruitment process inappropriately sought to avoid a cap that may have been placed on the number of positions to be offered at each level. In my view, when caps are in place – whether at SES or APS level – it is open to an agency to use an IFA to attract or retain talent if this meets a genuine operational need of the agency. Such a practice would not be a case of ‘getting around’ a cap in the sense of frustrating the underlying purpose of a cap, which is to limit the number of permanent employees at

particular level. Unlike the entitlements that attach to permanent appointments to the APS a person's IFA can be terminated at any time, including if it ceases to meet a genuine operational need. This is consistent with the accepted practice that agencies can use labour hire staff to meet genuine operational needs at considerably higher cost than permanent or non-ongoing staff so long as these actions are commensurate with relevant requirements under the *Public Governance, Performance and Accountability Act* (the PGPA Act).

I understand you were also concerned that some individuals who applied for a position at SES level were subsequently appointed to positions at EL2 level. In my view, it was reasonably open to the PID Investigator to not make a finding of disclosable conduct relating to the decision and decision-making process that led to appointing these individuals to positions at EL2 level. This is because it appears that relevant individuals were already employed by the agency at EL2 level. Sections 25 and 26 of the *Public Service Act 1999* and section 46 of the Australian Public Service Commissioner's Directions 2002 allow for a person to be moved 'at level' or to be assigned different duties, i.e. a different role, at level. This provides agencies with the ability to move people into a different role, at level. In my view, it was open to the PID Investigator to not make a finding of disclosable conduct relating to the decision and decision-making process that led to existing substantive EL2 staff being moved 'at level' to a different role at the same EL2 level.

#### Grounds of review in respect of the decision to terminate the Ombudsman's investigation

[1113] The complaint in respect of broadbanding had plainly been too subtle for Mr Anstey to follow; Mr Anstey has missed the point. Naturally, "arrangements the agency put in place for several appointees did not allow individuals appointed to the positions at EL2 level via an individual flexibility arrangement (IFA) to progress to the SES level without the need for an open, competitive selection process" because the National Judicial Registrar role had never been allocated an Executive Level 2 classification under **rule 9** of the *Public Service Classification Rules 2000* (Cth). I was not suggesting that an *explicit* broadbanding arrangement had been effected; it would be impossible to effect an explicit broadbanding arrangement where the National Judicial Registrar role had **never** been the subject of a role review, such that an Executive Level 2 classification was allocated to the National Judicial Registrar role pursuant to **rule 9** of the *Public Service Classification Rules 2000* (Cth).

[1114] Rather, Ms McMullan's conclusion that the National Judicial Registrar could bear both an Executive Level 2 and Senior Executive Band 1 classification on no basis other than the relative work load and complexity of the work undertaken would mean that Ms McMullan was suggesting that a **constructive** broadbanding arrangement across a Senior Executive Band classification were permissible, even though it is explicitly prohibited under rule 9(5) of the *Public Service Classification Rules 2000* (Cth). Of course, as has already been noted in part VIII of this review application, work load can never be a ground for allocating a particular classification to a group of duties and, by force of logic, can never be relevant to a broadbanding arrangement.

[1115] The complaint about *constructive* broadbanding is ultimately a derivative issue and, as such, will not be pressed in the grounds of review.

[1116] The complaint about constructive broadbanding is derivative because it presupposes that the National Judicial Registrar role was the subject of a role re-evaluation (i.e. a role review) such that, following a lawful review, an Executive Level 2 classification was allocated to the National Judicial Registrar role, for the purposes of rule 9 of the *Public Service Classification Rules 2000* (Cth), on the basis that “*the NJR positions could be held at the SESB1 level in some registrars (sic), and at the Legal 2 level in other registrars (sic)*’ due to an assessment about the differing volume and complexity of work in each registry.”

[1117] While it is difficult to prove a negative, I will demonstrate that there never was a role review and, as such, there was no evidentiary basis for finding that “*the NJR positions could be held at the SESB1 level in some registrars (sic), and at the Legal 2 level in other registrars (sic)*’ due to an assessment about the differing volume and complexity of work in each registry.”

[1118] My grounds of review are as follows:

1) Mr Anstey’s claim that “[t]he APS Classification Guide *recommends* a role review or role evaluation be carried out in certain circumstances ...” is false;

2) Mr Anstey’s claim that “[c]onducting and documenting a role review is not set down in legislation” is stunted and misinformed because the legal obligation to conduct and document a role review is legislatively mandated;

3) Mr Anstey’s claim that “ultimately it is at the discretion of the Agency Head to determine the duties of an employee and determine an appropriate classification based on those duties” is false;

4) Mr Anstey’s claim that “[i]t nevertheless seems reasonably open to the PID Investigator to have concluded that there was a review conducted as the Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level and this decision was documented” is unjustifiable;

5) The fact that Mr Anstey was unperturbed by Ms McMullan’s finding that a “decision to reclassify these positions was made *on the basis of the relative volume and complexity of work undertaken in the various registrars (sic)*” demonstrates a failure on Mr Anstey’s part to understand how classification decisions are to be made;

6) Mr Anstey’s claims about the “SES cap” are, in the light of the evidence, misinformed;

7) Mr Anstey’s claim that “[s]ections 25 and 26 of the *Public Service Act 1999* and section 46 of the Australian Public Service Commissioner’s Directions 2022 allow for a person to be moved ‘at level’ or to be assigned different duties, i.e. a different role, at level” is irrelevant and incorrect; and

8) Mr Anstey’s failure to address Ms McMullan’s failure to investigate the allegation that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct when they handed Tuan Van Le a National Judicial Registrar role for which there had been no role evaluation, and for which there was no merit based selection process.

#### *Ground 1*

[1119] I adopt the reasoning in paragraphs [292] – [301] in this email.

#### *Ground 2*

[1120] I adopt the reasoning in paragraphs [302] – [314] in this email.

#### *Ground 3*

[1121] I adopt the reasoning in paragraphs [315] – [318] in this email.

#### *Ground 4*

[1122] I adopt, *mutatis mutandis*, the reasoning in paragraphs [950] – [1026] of this email. If you do not understand what it means to adopt reasoning *mutatis mutandis*, or are incapable of doing so, please let me know in advance of making a decision so that I will not have to grapple with yet another stupid decision.

#### *Ground 5*

[1123] I adopt the reasoning in paragraphs [378] – [393] of this email.

#### *Ground 6*

[1124] I adopt the reasoning in paragraphs [725] – [737] of this email.

#### *Ground 7*

[1125] Mr Anstey stated that “[s]ections 25 and 26 of the *Public Service Act 1999* and section 46 of the Australian Public Service Commissioner’s Directions 2022 allow for a person to be moved ‘at level’ or to be assigned different duties, i.e. a different role, at level.” That finding or conclusion is both irrelevant to the situation and, as a matter of law, incorrect.

[1126] I will dispose of the reliance placed on section 26 of the *Public Service Act 1999* (Cth) and section 46 of the *Australian Public Service Commissioner’s Directions 2022* (Cth), before dealing with the application of section 25 of the *Public Service Act 1999* (Cth).

#### A. Section 26 of the *Public Service Act 1999* (Cth)

[1127] I adopt, *mutatis mutandis*, the reasoning in paragraphs [1031] – [1036] of this email. If you do not understand what it means to adopt reasoning *mutatis mutandis*, or are incapable of doing so,

please let me know in advance of making a decision so that I will not have to grapple with yet another stupid decision.

B. Section 46 of the *Australian Public Service Commissioner's Directions 2022* (Cth)

[1128] I adopt the reasoning in paragraphs [746] – [748] of this email.

C. Section 25 of the *Public Service Act 1999* (Cth)

[1129] I adopt, *mutatis mutandis*, the reasoning in paragraphs [1038] – [1053] of this email. If you do not understand what it means to adopt reasoning *mutatis mutandis*, or are incapable of doing so, please let me know in advance of making a decision so that I will not have to grapple with yet another stupid decision.

*Ground 8*

[1130] I adopt, *mutatis mutandis*, the reasoning in paragraphs [1054] – [1064] of this email. If you do not understand what it means to adopt reasoning *mutatis mutandis*, or are incapable of doing so, please let me know in advance of making a decision so that I will not have to grapple with yet another stupid decision.

*Relief sought*

[1131] I request that:

a) Mr Anstey's decision to terminate the investigation under the *Ombudsman Act 1976* (Cth) be set aside on the basis of the grounds of review articulated above (both general and specific);

b) the Ombudsman make a finding that Kate McMullan's finding that "[t]he evidence provided indicates that as a result of a role review, a determination was made that NJR positions could be held at the SESB1 level in some registrars, and at the Legal 2 level in other registrars" was not based on evidence;

c) the Ombudsman make a finding that Kate McMullan's finding that "[t]he evidence provided indicates that as a result of a role review, a determination was made that NJR positions could be held at the SESB1 level in some registrars, and at the Legal 2 level in other registrars" was not based on any evidence available to her;

d) the Ombudsman make a finding that Kate McMullan's finding in respect of the National Judicial Registrar roles, which was "a role review process ... had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load" is not justifiable and is, thus, wrong because, first, it is not permissible to classify or reclassify a role on the basis of the workload of the role, and, second, there was not evidence before Ms McMullan, and there is actually no evidence simpliciter, that there ever was a "role review process" such that the National Judicial Registrar role had been allocated an Executive Level 2 classification for the purposes of **rule 9** of the *Public Service Classification Rules 2000* (Cth);

e) the Ombudsman make a finding that Kate McMullan contravened her statutory duty, under the *Public Interest Disclosure Act 2013* (Cth), by functionally refusing to investigate the disclosable conduct that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct by handing out an Executive Level 2 classification to Tuan Van Le under **rule 6** of the *Public Service Classification Rules 2000* (Cth) i) for a role that had never been allocated an Executive Level 2 classification under **rule 9** of the *Public Service Classification Rules 2000* (Cth); and ii) for a role that had never been the subject of a vacancy notification, which notified the Australian community that there was a role that eligible members of the community would be permitted to apply for;

f) the Ombudsman make a finding that Kate McMullan contravened her statutory duty, under the *Public Interest Disclosure Act 2013* (Cth), by functionally refusing to investigate the disclosable conduct that officials in the Federal Court of Australia Statutory Agency contravened several provisions of the Code of Conduct by handing out Executive Level 2 classifications to individuals like Tuan Van Le, under **rule 6** of the *Public Service Classification Rules 2000* (Cth) with the stated purpose of cheating the capped number of SES positions available to the Federal Court of Australia Statutory Agency;

g) the Ombudsman make a finding that Kate McMullan failed to comply with procedures established under subsection 15(3) of the *Public Service Act 1999* (Cth) in investigating alleged breaches of the Code of Conduct and had thus failed to comply with paragraph 53(5)(b) of the *Public Interest Disclosure Act 2013* (Cth);

h) the Ombudsman prepare a report of his findings, and refer the matter back to the Australian Public Service Commissioner with a recommendation that the Commissioner reinvestigate the public interest disclosure according to law.

#### **XIV – ANNEXURES**

[1132] This email has been meticulously marked with citations. There are references to two kinds of annexures.

[1133] The first kind, which appears as “Annexure EDR – [Numeral]”, refers to annexures that were made available to the Office of the Commonwealth Ombudsman in support of my complaint of 26 October 2021. You already have access to those documents, and, but for Annexure EDR – 95, they will not be provided to you again.

[1134] The second kind, which appears as “Annexure OMBR – [Numeral]”, refers to documentary evidence that you may not have access to. The majority of the documents with references “Annexure OMBR – [Numeral]” are publicly accessible freedom of information requests and responses, particularly from the Federal Court of Australia. They, on the whole, demonstrate the fact that there is no documentary evidence of any “role reviews”, which is most fascinating because Mark Anstey insists he has access to a document recording the Federal Court Agency Head’s decision to allocate Executive Level 2 classifications to the National Judicial Registrar role, the National Judicial Registrar & District Registrar – Western Australia role, and the National Judicial Registrar & District Registrar – Queensland role. I am certain a well placed freedom of information request will demolish his false claim.

[1135] The annexures, which appear in the form of “Annexure OMBR – [Numeral]”, will be sent to you as attachments to separate emails.

#### **XV – CONCLUDING REMARKS**

Acknowledging review request

[1136] Please acknowledge receipt of this email as soon as practicable and, in any case, no later than 17:00 AEDT on Friday 17 March 2023. In your acknowledgement email, please notify me as to how long I will be expected to wait before the review manager provides a decision on accepting or refusing this request for review.

Competence of official considering review application

[1137] Please ensure that this request for review is allocated for the consideration of somebody who is competent. By this I mean somebody who has:

- a) a basic command of critical reasoning;
- b) the forensic aptitude that would reasonably be expected of a person who conducts administrative investigations; and
- c) a healthy and abiding respect for the laws of Australia.

[1138] To put it another way, I would appreciate it if the person who considers this internal review request is somebody who, unlike Mark Anstey, will:

- a) not take a dump on the fundamentals of federal administrative law;
- b) take heed of the judgments of the High Court and of the superior courts of Australia (instead of trashing them); and
- c) not fart-arse for 412 days before deciding to crap out a five page abortion.

[1139] In a pinch, please ensure that somebody in the agency who has a functioning brain and isn't a terminal chump handles this request for review.

Yours faithfully

Discloser

## **ENDNOTES**

<sup>1</sup>Annexure OMBR – 1.

<sup>2</sup>[www.ombudsman.gov.au/complaints/how-to-make-a-complaint/request-a-review-of-your-complaint-outcome](http://www.ombudsman.gov.au/complaints/how-to-make-a-complaint/request-a-review-of-your-complaint-outcome).

<sup>3</sup>[www.ombudsman.gov.au/complaints/how-to-make-a-complaint/request-a-review-of-your-complaint-outcome](http://www.ombudsman.gov.au/complaints/how-to-make-a-complaint/request-a-review-of-your-complaint-outcome).

<sup>4</sup>Annexure OMBR – 1.

<sup>5</sup>Annexure OMBR – 1.

<sup>6</sup>*SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, [32].

<sup>7</sup>*Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180, [83].

<sup>8</sup>*Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 242, [11].

<sup>9</sup>*Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 242, [13].

<sup>10</sup>*Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 242, [15].

<sup>11</sup>*Ombudsman Act 1976* (Cth), s 8(2).

<sup>12</sup>*Ombudsman Act 1976* (Cth), s 12(1).

<sup>13</sup>*Jarratt v Commissioner of Police for New South Wales* (2005) 224 CLR 44, [24].

<sup>14</sup>*Jarratt v Commissioner of Police for New South Wales* (2005) 224 CLR 44, [25].

<sup>15</sup>*Jarratt v Commissioner of Police for New South Wales* (2005) 224 CLR 44, [24].

<sup>16</sup>Notice that the judgment in *Alphaone*, and the High Court authorities endorsing *Alphaone*, provide that procedural fairness requirements, which includes the obligation of disclosure, are enlivened when there is a **likelihood** of prejudice to a person's interests.

<sup>17</sup>Annexure OMBR – 1.

<sup>18</sup>*SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, [29] and [32]; *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180, [83].

<sup>19</sup>*Public Interest Disclosure Act 2013* (Cth), s 6(d).

- [20](#)External Disclosure Report, part 6.5.2.
- [21](#)External Disclosure Report, paragraphs 410 – 411.
- [22](#)External Disclosure Report, part 6.5.2.
- [23](#)External Disclosure Report, part 6.5.2 and, in particular, paragraphs 410 – 411.
- [24](#)*Public Service Act 1999* (Cth), s 10A(2).
- [25](#)Annexure EDR – 57.
- [26](#)Annexure EDR – 58.
- [27](#)Annexure EDR – 68.
- [28](#)*Public Service Act 1999* (Cth), s 10A(2)(b).
- [29](#)Mark Anstey was provided with a 432 page compilation of the applications submitted for the National Registrar vacancies in the Federal Court by staff members in the Australian Public Service Commission. A casual perusal of that 432 page document demonstrates that scores of candidates had superior claims to performing the duties relevant to the National Registrar role than did Rohan Muscat.
- [30](#)*Public Interest Disclosure Act 2013* (Cth), s 6(d).
- [31](#)*Public Interest Disclosure Act 2013* (Cth), s 6(d).
- [32](#)e.g. *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152; *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180.
- [33](#)*Public Interest Disclosure Act 2013* (Cth), s 6(d).
- [34](#)*SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, [29] and [32]; *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180, [83].
- [35](#)e.g. *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152; *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180.
- [36](#)*Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180, [82].
- [37](#)*Administrative Review Best Practice Guide 4 – Decision Making: Reasons* – refer to [www.ag.gov.au/legal-system/publications/administrative-review-council-best-practice-guide-4-reasons](http://www.ag.gov.au/legal-system/publications/administrative-review-council-best-practice-guide-4-reasons) for a copy of the document.
- [38](#)*Administrative Review Best Practice Guide 4 – Decision Making: Reasons*, p 8.
- [39](#)Annexure OMBR – 2.
- [40](#)Annexure OMBR – 3.
- [41](#)Annexure OMBR – 2.
- [42](#)Annexure OMBR – 3.
- [43](#)Annexure OMBR – 4.

- [44](#)Annexure OMBR – 5.
- [45](#)Annexure OMBR – 6.
- [46](#)Annexure OMBR – 7.
- [47](#)Annexure OMBR – 6.
- [48](#)Annexure OMBR – 8.
- [49](#)*Public Interest Disclosure Standard 2013* (Cth), s 12(1).
- [50](#)*Public Interest Disclosure Standard 2013* (Cth), s 12(2).
- [51](#)Annexure EDR – 46B.
- [52](#)Annexure EDR – 46B.
- [53](#)Annexure EDR – 46B.
- [54](#)Annexure EDR – 46B.
- [55](#)Annexure EDR – 11.
- [56](#)Annexure EDR – 11.
- [57](#)*Public Service Act 1999* (Cth), s 41(1)(a).
- [58](#)*Public Service Act 1999* (Cth), s 41(1)(b).
- [59](#)*Public Service Act 1999* (Cth), s 41(2)(c).
- [60](#)*Australian Public Service Classification Guide*, Part Three: Work Level Standards – Key concepts.
- [61](#)*Australian Public Service Classification Guide*, Part Three: Work Level Standards – Key concepts.
- [62](#)*Australian Public Service Classification Guide*, Part Four: Classification Management in Practice – Role evaluation principles.
- [63](#)*Public Service Act 1999* (Cth), s 41(1)(a).
- [64](#)*Public Service Act 1999* (Cth), s 41(1)(b).
- [65](#)*Public Service Act 1999* (Cth), s 41(2)(c).
- [66](#)*Public Service Act 1999* (Cth), s 41(1)(a).
- [67](#)*Public Service Act 1999* (Cth), s 41(1)(b).
- [68](#)*Public Service Act 1999* (Cth), s 41(2)(c).
- [69](#)*Australian Public Service Classification Guide*, Part Three: Work Level Standards – Key concepts.
- [70](#)*Australian Public Service Classification Guide*, Part Three: Work Level Standards – Key concepts.
- [71](#)*Public Interest Disclosure Act 2013* (Cth) s 6(d).
- [72](#)*SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, [29].

[73](#)*SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, [29].

[74](#)*Public Service Act 1999* (Cth), s 41(1)(a).

[75](#)*Public Service Act 1999* (Cth), s 41(1)(b).

[76](#)*Public Service Act 1999* (Cth), s 41(2)(c).

[77](#)*Australian Public Service Classification Guide*, Part Three: Work Level Standards – Key concepts.

[78](#)*Australian Public Service Classification Guide*, Part Three: Work Level Standards – Key concepts.

[79](#)See, for example, part 5.7 of the External Disclosure Report.

[80](#)Annexure EDR – 11.

[81](#)Annexure EDR – 11.

[82](#)See parts 8.5.2.2 – 8.5.2.4 of the External Disclosure Report.

[83](#)Annexure OMBR – 1.

[84](#)Annexure OMBR – 1.

[85](#)Annexure OMBR – 1.

[86](#)Annexure OMBR – 1.

[87](#)Annexure OMBR – 1.

[88](#)Annexure OMBR – 1.

[89](#)Annexure OMBR – 1.

[90](#)Annexure OMBR – 1.

[91](#)Annexure EDR – 47.

[92](#)Annexure EDR – 53.

[93](#)Annexure EDR – 53.

[94](#)Annexure EDR – 54.

[95](#)Annexure EDR – 54.

[96](#)Annexure EDR – 46B; also see Annexure EDR – 11.

[97](#)Annexure EDR – 46B; also see Annexure EDR – 11.

[98](#)Annexure EDR – 46B; also see Annexure EDR – 11.

[99](#)Annexure EDR – 46B; also see Annexure EDR – 11.

[100](#)External Disclosure Report, part 5.5.1.

[101](#)External Disclosure Report, part 5.5.1.

[102](#)External Disclosure Report, part 5.5.1.

[103](#)External Disclosure Report, part 5.6

[104](#)External Disclosure Report, part 5.7

[105](#)External Disclosure Report, part 9.2.

[106](#)External Disclosure Report, para 1333 – 1334.

[107](#)Annexure OMBR – 1.

[108](#)Annexure OMBR – 1.

[109](#)Annexure OMBR – 1.

[110](#)Annexure OMBR – 1.

[111](#)Annexure OMBR – 1.

[112](#)Annexure OMBR – 1.

[113](#)External Disclosure Report, part 5.7.

[114](#)External Disclosure Report, part 9.2.

[115](#)Annexure EDR – 57.

[116](#)Annexure EDR – 58.

[117](#)Annexure EDR – 60.

[118](#)Annexure EDR – 61.

[119](#)Annexure EDR – 62.

[120](#)Annexure EDR – 63.

[121](#)Annexure EDR – 63.

[122](#)Annexure EDR – 63.

[123](#)Annexure EDR – 63.

[124](#)Annexure EDR – 63.

[125](#)Annexure EDR – 64.

[126](#)Annexure EDR – 64.

[127](#)Annexure EDR – 65; Annexure EDR – 67.

[128](#)Annexure EDR – 71; Annexure EDR – 66.

[129](#)Annexure EDR – 77.

[130](#)Annexure EDR – 80.

[131](#)Annexure EDR – 79.

[132](#)Annexure EDR – 11.

[133](#)External Disclosure Report, part 6.5.2.

- [134](#) External Disclosure Report, paragraphs 410 – 411.
- [135](#) External Disclosure Report, part 6.5.2.
- [136](#) External Disclosure Report, paragraph 419.
- [137](#) External Disclosure Report, part 6.6.
- [138](#) External Disclosure Report, part 6.8.
- [139](#) Annexure EDR – 11.
- [140](#) External Disclosure Report, parts 6.5.1, 6.5.3 (including 6.5.3.1 and 6.5.3.2).
- [141](#) Annexure OMBR – 1.
- [142](#) Annexure OMBR – 1.
- [143](#) Annexure OMBR – 1.
- [144](#) Annexure OMBR – 1.
- [145](#) Annexure OMBR – 1.
- [146](#) *Public Interest Disclosure Act 2013* (Cth) s 29.
- [147](#) *Public Interest Disclosure Act 2013* (Cth) s 26.
- [148](#) *Public Interest Disclosure Act 2013* (Cth) s 43(1), 43(2).
- [149](#) *Public Interest Disclosure Act 2013* (Cth) s 47(1).
- [150](#) Annexure EDR – 7.
- [151](#) External Disclosure Report, part 6.5.2 and, in particular, paragraphs 410 – 411.
- [152](#) *Public Service Act 1999* (Cth), s 10A(2).
- [153](#) Those applications were provided to the Office of the Commonwealth Ombudsman by the Australian Public Service Commission. The applications were compiled in a 432 page pdf document. The first application in that compilation document was that of Anna Courtman, and the final application in that compilation document was that of Adam Bundy.
- [154](#) Annexure EDR – 57.
- [155](#) Annexure EDR – 58.
- [156](#) Annexure EDR – 68.
- [157](#) *Public Service Act 1999* (Cth), s 10A(2)(b).
- [158](#) Mark Anstey was provided with a 432 page compilation of the applications submitted for the National Registrar vacancies in the Federal Court by staff members in the Australian Public Service Commission. A casual perusal of that 432 page document demonstrates that scores of candidates had superior claims to performing the duties relevant to the National Registrar role than did Rohan Muscat.
- [159](#) Annexure OMBR – 1.

[160](#)Annexure EDR – 64.

[161](#)Annexure EDR – 63.

[162](#)Annexure EDR – 62.

[163](#)Annexure OMBR – 1.

[164](#)Annexure OMBR – 1.

[165](#)Annexure OMBR – 1.

[166](#)*Public Interest Disclosure Act 2013* (Cth), s 6(d).

[167](#)External Disclosure Report, part 6.6.

[168](#)External Disclosure Report, part 6.8.

[169](#)Annexure EDR – 98.

[170](#)Annexure EDR – 129.

[171](#)Annexure EDR – 129.

[172](#)Annexure EDR – 129.

[173](#)Annexure EDR – 129.

[174](#)Annexure EDR – 129.

[175](#)Annexure EDR – 129.

[176](#)Annexure EDR – 131.

[177](#)Annexure EDR – 132.

[178](#)Annexure EDR – 132.

[179](#)Annexure EDR – 132.

[180](#)Annexure EDR – 134.

[181](#)Annexure EDR – 129.

[182](#)Annexure EDR – 130.

[183](#)Annexure EDR – 130.

[184](#)Annexure EDR – 11.

[185](#)Annexure EDR – 11.

[186](#)Annexure EDR – 11.

[187](#)External Disclosure Report, part 8.5.1.3.

[188](#)External Disclosure Report, part 8.5.1.3.

[189](#)External Disclosure Report, parts 8.5.1.3.1 – 8.5.1.3.3.

[190](#)External Disclosure Report, part 8.5.1.4.

[191](#)External Disclosure Report, part 8.5.1.6.

[192](#)External Disclosure Report, part 8.5.1.6.

[193](#)External Disclosure Report, parts 8.5.2 and 8.5.2.2.

[194](#)External Disclosure Report, part 8.5.2.4.

[195](#)External Disclosure Report, part 8.5.2.4.

[196](#)External Disclosure Report, part 8.5.2.4.

[197](#)Annexure OMBR – 1.

[198](#)Annexure OMBR – 1.

[199](#)Annexure OMBR – 1.

[200](#)Annexure OMBR – 1.

[201](#)Annexure OMBR – 1.

[202](#)Annexure OMBR – 1.

[203](#)*Public Service Act 1999* (Cth), s 41(1)(a).

[204](#)*Public Service Act 1999* (Cth), s 41(1)(b).

[205](#)*Public Service Act 1999* (Cth), s 41(2)(c).

[206](#)*Public Service Act 1999* (Cth), s 41(2)(r).

[207](#)*Australian Public Service Classification Guide*, Part 4, “Role evaluation”.

[208](#)*Australian Public Service Classification Guide*, Part 4, “Assessing a role”.

[209](#)*Australian Public Service Classification Guide*, Part 4, “Assessing a role”.

[210](#)*Australian Public Service Classification Guide*, Part 4, “Documentation”.

[211](#)*Australian Public Service Classification Guide*, Part 4, “Documentation”.

[212](#)*Australian Public Service Classification Guide*, Part 2, “Documenting classification decisions”.

[213](#)*Australian Public Service Classification Guide*, Part 2, “Documenting classification decisions”.

[214](#)*Public Service Act 1999* (Cth), s 41(1)(a).

[215](#)*Public Service Act 1999* (Cth), s 41(1)(b).

[216](#)*Public Service Act 1999* (Cth), s 41(2)(c).

[217](#)*Public Service Act 1999* (Cth), s 41(2)(r).

[218](#)*Public Service Classification Rules 2000* (Cth), r 9(1).

[219](#)*Public Service Classification Rules 2000* (Cth), r 9(2).

[220](#)*Public Service Classification Rules 2000* (Cth), r 9(2A).

[221www.apsc.gov.au/initiatives-and-programs/workforce-information/aps-hierarchy-and-classification-review](http://www.apsc.gov.au/initiatives-and-programs/workforce-information/aps-hierarchy-and-classification-review).

[222](#)External Disclosure Report, part 8.5.2.3.

[223](#)Annexure OMBR – 2.

[224](#)Annexure OMBR – 3.

[225](#)Annexure EDR – 93.

[226](#)Annexure EDR – 94.

[227](#)Annexure EDR – 134.

[228](#)Annexure EDR – 134.

[229](#)Annexure EDR – 95.

[230](#)Annexure EDR – 95.

[231](#)Annexure EDR – 93; Annexure EDR – 129.

[232](#)Annexure EDR – 129.

[233](#)Annexure OMBR – 3.

[234](#)*Fair Work Act 2009* (Cth), s 202(1)(a).

[235](#)*Federal Court of Australia Act 1976* (Cth), s 34(3).

[236](#)Annexure OMBR – 3.

[237](#)Annexure EDR – 130.

[238](#)Annexure EDR – 93.

[239](#)Annexure EDR – 94.

[240](#)Annexure EDR – 94.

[241](#)Annexure EDR – 134.

[242](#)Annexure EDR – 134.

[243](#)Annexure EDR – 93.

[244](#)Annexure EDR – 93.

[245](#)Annexure EDR – 130.

[246](#)Annexure EDR – 98.

[247](#)Annexure OMBR – 2.

[248](#)Annexure OMBR – 3.

[249](#)Annexure EDR – 93, page 8.

[250](#)Annexure EDR – 95.

[251](#)Annexure EDR – 95.

[252](#)Annexure EDR – 95.

[253](#)Annexure EDR – 95.

[254](#)Annexure EDR – 95.

[255](#)Annexure EDR – 95.

[256](#)Annexure EDR – 95.

[257](#)Annexure EDR – 95.

[258](#)Annexure EDR – 93.

[259](#)Annexure EDR – 93.

[260](#)Annexure EDR – 93.

[261](#)Annexure EDR – 93; Annexure EDR – 92.

[262](#)Annexure EDR – 93.

[263](#)Annexure EDR – 93.

[264](#)Annexure EDR – 93.

[265](#)Annexure EDR – 93.

[266](#)Annexure EDR – 93.

[267](#)Annexure EDR – 93.

[268](#)Annexure EDR – 95.

[269](#)[https://www.righttoknow.org.au/request/vacancy\\_notification\\_for\\_ongoing#outgoing-19089](https://www.righttoknow.org.au/request/vacancy_notification_for_ongoing#outgoing-19089).

[270](#)[https://www.righttoknow.org.au/request/vacancy\\_notification\\_for\\_ongoing#incoming-28916](https://www.righttoknow.org.au/request/vacancy_notification_for_ongoing#incoming-28916).

[271](#)Annexure EDR – 95.

[272](#)Annexure EDR – 95.

[273](#)Annexure OMBR – 2.

[274](#)Annexure OMBR – 3.

[275](#)Annexure EDR – 93, page 8.

[276](#)Annexure EDR – 93.

[277](#)Annexure EDR – 94.

[278](#)Annexure EDR – 134.

[279](#)Annexure EDR – 134.

[280](#)Annexure EDR – 134.

[281](#)Annexure EDR – 129.

[282](#)Annexure EDR – 129.

[283](#)Annexure EDR – 129.

[284](#)Annexure EDR – 95.

[285](#)Annexure OMBR – 3.

[286](#)Annexure EDR – 92; Annexure EDR – 93, page 4.

[287](#)Annexure EDR – 93, page 4.

[288](#)Annexure EDR – 95.

[289https://www.righttoknow.org.au/request/vacancy\\_notification\\_for\\_ongoing#incoming-28916](https://www.righttoknow.org.au/request/vacancy_notification_for_ongoing#incoming-28916).

[290](#)Annexure EDR – 134.

[291](#)*Australian Public Service Classification Guide*, Part Three: Work Level Standards – Key concepts.

[292](#)*Australian Public Service Classification Guide*, Part Three: Work Level Standards – Key concepts.

[293](#)*Australian Public Service Classification Guide*, Part Four: Classification Management in Practice – Role evaluation principles.

[294](#)*Australian Public Service Classification Guide*, Part Three: Work Level Standards – Key concepts.

[295](#)*Public Service Act 1999* (Cth), s 41(1)(a).

[296](#)*Public Service Act 1999* (Cth), s 41(1)(b).

[297](#)*Public Service Act 1999* (Cth), s 41(2)(c).

[298](#)*Australian Public Service Classification Guide*, Part Three: Work Level Standards – Key concepts.

[299](#)*Australian Public Service Classification Guide*, Part Three: Work Level Standards – Key concepts.

[300](#)*Australian Public Service Classification Guide*, Part Three: Work Level Standards – Key concepts.

[301](#)*Australian Public Service Classification Guide*, Part Three: Work Level Standards – Key concepts.

[302](#)*Australian Public Service Classification Guide*, Part Three: Work Level Standards – Key concepts.

[303](#)*Australian Public Service Classification Guide*, Part Three: Work Level Standards – Key concepts.

[304](#)*Australian Public Service Classification Guide*, Part Three: Work Level Standards – Key concepts.

[305](#)After all, Ms McMullan was duty bound to ensure that her findings of fact, aside from being based on relevant evidence, were based on logically probative evidence: *Public Interest Disclosure Standard 2013* (Cth), s 12.

[306](#)Annexure EDR – 98.

[307](#)Annexure EDR – 111.

[308](#)Annexure EDR – 111.

[309](#)Annexure EDR – 111.

[310](#)Annexure EDR – 111.

[311](#)Annexure EDR – 111.

[312](#)Annexure EDR – 111.

[313](#)Annexure EDR – 112.

[314](#)Annexure EDR – 112.

[315](#)Annexure EDR – 112.

[316](#)Annexure EDR – 111.

[317](#)Annexure EDR – 11.

[318](#)Annexure EDR – 11.

[319](#)External Disclosure Report, part 8.5.1.3.

[320](#)External Disclosure Report, part 8.5.1.3.

[321](#)External Disclosure Report, parts 8.5.1.3.1 – 8.5.1.3.3.

[322](#)External Disclosure Report, part 8.5.1.4.

[323](#)External Disclosure Report, part 8.5.1.6.

[324](#)External Disclosure Report, part 8.5.1.6.

[325](#)Annexure OMBR – 1.

[326](#)Annexure OMBR – 1.

[327](#)Annexure OMBR – 1.

[328](#)Annexure OMBR – 1.

[329](#)Annexure OMBR – 1.

[330](#)Annexure OMBR – 1.

[331](#)External Disclosure Report, part 8.5.2.3.

[332](#)Annexure OMBR – 2.

[333](#)Annexure OMBR – 3.

[334](#)Annexure EDR – 93.

[335](#)Annexure EDR – 94.

[336](#)Annexure EDR – 134.

[337](#)Annexure EDR – 95.

[338](#)Annexure EDR – 95.

[339](#)Annexure EDR – 93; Annexure EDR – 111.

[340](#)Annexure EDR – 111.

[341](#)Annexure EDR – 93, fifth page.

[342](#)Annexure OMBR – 3.

[343](#)Annexure EDR – 93, eighth page.

[344](#)Annexure EDR – 93, eighth page.

[345](#)Annexure EDR – 93, fifth page.

[346](#)*Fair Work Act 2009* (Cth), s 202(1)(a).

[347](#)Annexure EDR – 97.

[348](#)Annexure OMBR - 3.

[349](#)Annexure EDR – 93, eighth page.

[350](#)*Federal Court of Australia Act 1976* (Cth), s 34(3).

[351](#)Annexure OMBR – 3.

[352](#)Annexure EDR – 112.

[353](#)Annexure EDR – 93.

[354](#)Annexure EDR – 95.

[355](#)Annexure EDR – 94.

[356](#)Annexure EDR – 94.

[357](#)Annexure EDR – 134.

[358](#)Annexure EDR – 93.

[359](#)Annexure EDR – 93.

[360](#)Annexure EDR – 112.

[361](#)Annexure EDR – 98.

[362](#)Annexure OMBR – 2.

[363](#)Annexure OMBR – 3.

[364](#)Annexure EDR – 93, page 8.

[365](#)Annexure EDR – 95.

[366](#)Annexure EDR – 95.

[367](#)Annexure EDR – 95.

[368](#)Annexure EDR – 95.

[369](#)Annexure EDR – 95.

[370](#)Annexure EDR – 95.

[371](#)Annexure EDR – 95.

[372](#)Annexure EDR – 95.

[373](#)Annexure EDR – 93.

[374](#)Annexure EDR – 93.

[375](#)Annexure EDR – 93.

[376](#)Annexure EDR – 93; Annexure EDR – 92.

[377](#)Annexure EDR – 93.

[378](#)Annexure EDR – 93.

[379](#)Annexure EDR – 93.

[380](#)Annexure EDR – 93.

[381](#)Annexure EDR – 93.

[382](#)Annexure EDR – 93.

[383](#)Annexure EDR – 95.

[384](#)[https://www.righttoknow.org.au/request/vacancy\\_notification\\_for\\_ongoing#outgoing-19089](https://www.righttoknow.org.au/request/vacancy_notification_for_ongoing#outgoing-19089).

[385](#)[https://www.righttoknow.org.au/request/vacancy\\_notification\\_for\\_ongoing#incoming-28916](https://www.righttoknow.org.au/request/vacancy_notification_for_ongoing#incoming-28916).

[386](#)Annexure OMBR – 9.

[387](#)Annexure OMBR – 11.

[388](#)Annexure EDR – 95.

[389](#)Annexure EDR – 95.

[390](#)Annexure OMBR – 2.

[391](#)Annexure OMBR – 3.

[392](#)Annexure EDR – 93, eighth page.

[393](#)*Public Service Classification Rules 2000* (Cth), s 9(2A), which requires that “the allocation of an APS Level classification, Executive Level classification or SES Level classification to a group of duties **must** be based on the work value of the group of duties described in the work level standards issued, in writing, by the Commissioner.”

[394](#)Annexure EDR – 94.

[395](#)Annexure EDR – 111.

[396](#)Annexure EDR – 111.

[397](#)Annexure EDR – 111.

[398](#)Annexure EDR – 95.

[399](#)Annexure OMBR – 3.

[400](#)Annexure EDR – 93, fourth page; Annexure EDR – 92.

[401](#)Annexure EDR – 93, fourth page.

[402](#)Annexure EDR – 95.

[403](https://www.righttoknow.org.au/request/vacancy_notification_for_ongoing#incoming-28916)[https://www.righttoknow.org.au/request/vacancy\\_notification\\_for\\_ongoing#incoming-28916](https://www.righttoknow.org.au/request/vacancy_notification_for_ongoing#incoming-28916).

[404](#)AIFOE – COLBRAN DECISION.

[405](#)Annexure EDR – 134.

[406](#)*Australian Public Service Classification Guide*, Part Three: Work Level Standards – Key concepts.

[407](#)*Australian Public Service Classification Guide*, Part Three: Work Level Standards – Key concepts.

[408](#)*Australian Public Service Classification Guide*, Part Four: Classification Management in Practice – Role evaluation principles.

[409](#)*Australian Public Service Classification Guide*, Part Three: Work Level Standards – Key concepts.

[410](#)*Public Service Act 1999* (Cth), s 41(1)(a).

[411](#)*Public Service Act 1999* (Cth), s 41(1)(b).

[412](#)*Public Service Act 1999* (Cth), s 41(2)(c).

[413](#)*Australian Public Service Classification Guide*, Part Three: Work Level Standards – Key concepts.

[414](#)*Australian Public Service Classification Guide*, Part Three: Work Level Standards – Key concepts.

[415](#)*Australian Public Service Classification Guide*, Part Three: Work Level Standards – Key concepts.

[416](#)*Australian Public Service Classification Guide*, Part Three: Work Level Standards – Key concepts.

[417](#)*Australian Public Service Classification Guide*, Part Three: Work Level Standards – Key concepts.

[418](#)*Australian Public Service Classification Guide*, Part Three: Work Level Standards – Key concepts.

[419](#) *Australian Public Service Classification Guide*, Part Three: Work Level Standards – Key concepts.

[420](#) After all, Ms McMullan was duty bound to ensure that her findings of fact, aside from being based on relevant evidence, were based on logically probative evidence: *Public Interest Disclosure Standard 2013* (Cth), s 12.

[421](#) Annexure EDR – 85.

[422](#) Annexure EDR – 90.

[423](#) Annexure OMBR – 12; Annexure EDR – 90.

[424](#) Annexure OMBR – 9; Annexure OMBR – 11.

[425](#) Annexure EDR – 92.

[426](#) Annexure EDR – 92.

[427](#) Annexure EDR – 92.

[428](#) Annexure EDR – 92.

[429](#) Annexure EDR – 92.

[430](#) Annexure EDR – 92.

[431](#) Annexure EDR – 129.

[432](#) Annexure EDR – 131.

[433](#) Annexure EDR – 132.

[434](#) Annexure EDR – 132.

[435](#) Annexure EDR – 132.

[436](#) Annexure EDR – 96.

[437](#) Annexure EDR – 130.

[438](#) Annexure EDR – 134.

[439](#) Annexure EDR – 11.

[440](#) Annexure EDR – 11.

[441](#) Annexure EDR – 11.

[442](#) External Disclosure Report, part 8.5.1.6.

[443](#) External Disclosure Report, part 8.5.1.6.

[444](#) External Disclosure Report, part 7.5.2.1.

[445](#) Annexure OMBR – 1.

[446](#) Annexure OMBR – 1.

[447](#) Annexure OMBR – 1.

[448](#)Annexure OMBR – 1.

[449](#)Annexure OMBR – 1.

[450](#)Annexure OMBR – 1.

[451](#)*Australian Public Service Commissioner’s Directions 2016* (Cth), s 20(1)(a).

[452](#)*Australian Public Service Commissioner’s Directions 2016* (Cth), s 20(1)(b).

[453](#)*Australian Public Service Commissioner’s Directions 2016* (Cth), s 21.

[454](#)[https://www.righttoknow.org.au/request/vacancy\\_notification\\_for\\_ongoing#outgoing-19089](https://www.righttoknow.org.au/request/vacancy_notification_for_ongoing#outgoing-19089).

[455](#)[https://www.righttoknow.org.au/request/vacancy\\_notification\\_for\\_ongoing#incoming-28916](https://www.righttoknow.org.au/request/vacancy_notification_for_ongoing#incoming-28916).

[456](#)<https://webarchive.nla.gov.au/tep/75984>.

[457](#)*Australian Public Service Commissioner’s Directions 2016* (Cth), s 20(1)(b).

[458](#)Annexure OMBR – 9.

[459](#)Annexure OMBR – 11.

[460](#)Annexure OMBR – 9.

[461](#)Annexure OMBR – 11.

[462](#)Annexure OMBR – 12; Annexure EDR – 90.

[463](#)Annexure OMBR – 9.

[464](#)Annexure OMBR – 11.

[465](#)Annexure OMBR – 9.

[466](#)Annexure OMBR – 11.

[467](#)Annexure OMBR – 12; Annexure EDR – 90.

[468](#)Annexure EDR – 93.

[469](#)Annexure EDR – 94.

[470](#)Annexure EDR – 134.

[471](#)Annexure EDR – 134.

[472](#)Annexure EDR – 95.

[473](#)Annexure EDR – 95.

[474](#)Annexure EDR – 93.

[475](#)Annexure EDR – 93; Annexure EDR – 129.

[476](#)Annexure EDR – 129.

[477](#)Annexure OMBR – 3.

[478](#)*Fair Work Act 2009* (Cth), s 202(1)(a).

[479](#)Annexure OMBR – 2; Annexure OMBR – 3.

[480](#)*Federal Court of Australia Act 1976* (Cth), s 34(3).

[481](#)Annexure OMBR – 3.

[482](#)Annexure EDR – 130.

[483](#)Annexure EDR – 93.

[484](#)Annexure EDR – 94.

[485](#)Annexure EDR – 94.

[486](#)Annexure EDR – 134.

[487](#)Annexure EDR – 134.

[488](#)Annexure EDR – 93.

[489](#)Annexure EDR – 93.

[490](#)Annexure EDR – 130.

[491](#)Annexure EDR – 98.

[492](#)Annexure OMBR – 2.

[493](#)Annexure OMBR – 3.

[494](#)Annexure EDR – 95.

[495](#)Annexure EDR – 111; Annexure EDR – 129.

[496](#)Annexure EDR – 111; Annexure EDR – 129.

[497](#)Annexure EDR – 111; Annexure EDR – 129.

[498](#)Annexure EDR – 93.

[499](#)Annexure EDR – 93.

[500](#)Annexure EDR – 93.

[501](#)Annexure EDR – 93, page 4.

[502](#)Annexure EDR – 93, page 4.

[503](#)Annexure EDR – 93; Annexure EDR – 129.

[504](#)Annexure EDR – 93.

[505](#)Annexure EDR – 93.

[506](#)Annexure EDR – 93.

[507](#)Annexure EDR – 93.

[508](#)Annexure EDR – 93.

[509](#)Annexure EDR – 93.

[510](#)Annexure EDR – 93.

[511](#)Annexure EDR – 93.

[512](#)Annexure EDR – 95.

[513](#)Annexure OMBR – 2.

[514](#)Annexure OMBR – 3.

[515](#)Annexure EDR – 93, eighth page.

[516https://www.righttoknow.org.au/request/vacancy\\_notification\\_for\\_ongoing#incoming-28916.](https://www.righttoknow.org.au/request/vacancy_notification_for_ongoing#incoming-28916)

[517](#)Annexure OMBR – 9.

[518](#)Annexure OMBR – 11.

[519](#)Annexure OMBR – 9.

[520](#)Annexure OMBR – 11.

[521](#)Annexure OMBR – 9.

[522](#)Annexure OMBR – 11.

[523](#)Annexure OMBR – 9.

[524](#)Annexure OMBR – 11.

[525](#)Annexure EDR – 134.

[526](#)Annexure OMBR – 13; Annexure OMBR – 14; Annexure EDR – 90; Annexure EDR – 100.

[527](#)Annexure OMBR – 9; Annexure OMBR – 11.

[528](#)Annexure EDR – 98.

[529](#)Annexure EDR – 104.

[530](#)Annexure EDR – 100.

[531](#)Annexure EDR – 104.

[532](#)Annexure EDR – 104.

[533](#)Annexure EDR – 104.

[534](#)Annexure EDR – 104.

[535](#)Annexure EDR – 104.

[536](#)Annexure EDR – 104.

[537](#)Annexure EDR – 104.

[538](#)Annexure EDR – 107.

[539](#)Annexure EDR – 107.

[540](#)Annexure EDR – 105; Annexure EDR – 107.

[541](#)Annexure EDR – 107.

[542](#)Annexure EDR – 11.

[543](#)Annexure EDR – 11.

[544](#)Annexure EDR – 11.

[545](#)Annexure EDR – 11.

[546](#)External Disclosure Report, part 7.5.2.2.

[547](#)It has already been demonstrated that there was no role review conducted for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – QLD role and the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – WA role because, in response to requests for access to role evaluation records that show that the SES Band 1 classified National Judicial Registrar & District Registrar roles in Queensland and Western Australia were, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated Executive Level 2 classifications for the purposes of rule 9 of the *Public Service Classification Rules 2000*, a decision maker in the Federal Court of Australia has refused to provide the documents because they do not exist:

[https://www.righttoknow.org.au/request/role\\_evaluation\\_records\\_for\\_nati#incoming-29274](https://www.righttoknow.org.au/request/role_evaluation_records_for_nati#incoming-29274).

[548](#)External Disclosure Report, part 7.5.2.2, and paragraphs 977 – 989 in particular.

[549](#)External Disclosure Report, part 7.5.2.2, and paragraph 966 in particular.

[550](#)*Australian Public Service Commissioner's Directions 2016* (Cth), s 20(1)(a).

[551](#)*Australian Public Service Commissioner's Directions 2016* (Cth), s 20(1)(b).

[552](#)*Australian Public Service Commissioner's Directions 2016* (Cth), s 19(1)(a).

[553](#)*Australian Public Service Commissioner's Directions 2016* (Cth), s 19(1)(b).

[554](#)*Australian Public Service Commissioner's Directions 2016* (Cth), s 19(1)(d).

[555](#)External Disclosure Report, part 7.5.2.2.

[556](#)As to the legislative requirement that findings be made on the basis of logically probative and relevant evidence, please refer to *Public Interest Disclosure Standard 2013* (Cth), s 12.

[557](#)External Disclosure Report, part 7.5.1.

[558](#)Annexure OMBR – 1.

[559](#)Annexure OMBR – 1.

[560](#)Annexure OMBR – 1.

[561](#)Annexure OMBR – 1.

[562](#)Annexure OMBR – 1.

[563](#)Annexure OMBR – 1.

[564](#)External Disclosure Report, part 7.5.2.2.

[565](#)Annexure OMBR – 15.

[566](#)Annexure OMBR – 16.

[567](#)Annexure OMBR – 16.

[568](#)Annexure EDR – 27.

[569](#)Annexure EDR – 27.

[570](#)Annexure EDR – 27.

[571](#)Annexure EDR – 93.

[572](#)Annexure EDR – 93, first page.

[573](#)Annexure EDR – 93, fifth page.

[574](#)Annexure EDR – 93, fifth page.

[575](#)Annexure EDR – 93, fifth page.

[576](#)Annexure EDR – 93; Annexure EDR – 129.

[577](#)Annexure EDR – 129.

[578](#)Annexure EDR – 93, fifth page.

[579](#)Annexure EDR – 93, fifth page.

[580](#)Annexure EDR – 93, fifth page.

[581](#)Annexure EDR – 93, fifth page.

[582](#)Annexure EDR – 93, fifth page.

[583](#)Annexure EDR – 93; Annexure EDR – 111.

[584](#)Annexure EDR – 111.

[585](#)Annexure EDR – 93, fifth page.

[586](#)Annexure EDR – 93, fifth page.

[587](#)Annexure EDR – 93, fourth and fifth pages.

[588](#)Annexure EDR – 93, fourth page.

[589](#)Annexure EDR – 93, fourth and fifth pages.

[590](#)Annexure EDR – 93; Annexure EDR – 104.

[591](#)Annexure EDR – 104.

[592](#)Annexure EDR – 93, fourth and fifth pages; Annexure EDR – 104.

[593](#)Annexure EDR – 93, fifth page.

[594](#)Annexure EDR – 93, fifth page.

[595](#)Annexure EDR – 93, fifth page.

[596](#)*Public Service Act 1999* (Cth), s 41(1)(a).

[597](#)*Public Service Act 1999* (Cth), s 41(1)(b).

[598](#)*Public Service Act 1999* (Cth), s 41(2)(c).

[599](#)*Public Service Act 1999* (Cth), s 41(2)(r).

[600](#)*Australian Public Service Classification Guide*, Part 4, “Documentation”.

[601](#)*Australian Public Service Classification Guide*, Part 4, “Documentation”.

[602](#)*Australian Public Service Classification Guide*, Part 2, “Documenting classification decisions”.

[603](#)*Australian Public Service Classification Guide*, Part 2, “Documenting classification decisions”.

[604](#)*Public Service Act 1999* (Cth), s 14.

[605](#)*Public Service Act 1999* (Cth), s 14.

[606](#)*Public Service Act 1999* (Cth), s 13(11)(a).

[607](#)*Australian Public Service Commissioner’s Guidelines 2016* (Cth), s 14(e).

[608](#)Annexure OMBR – 3.

[609](#)Annexure EDR – 93, eighth page.

[610](#)See paragraphs [344] – [347] and [452] – [455] of this email.

[611](#)*Federal Court of Australia Act 1976* (Cth), s 34(3).

[612](#)Annexure EDR – 95; Annexure EDR – 96.

[613](#)Annexure OMBR – 3.

[614](#)*Public Interest Disclosure Standard 2013* (Cth), s 12(1).

[615](#)*Public Interest Disclosure Standard 2013* (Cth), s 12(2).

[616](#)Annexure OMBR – 17.

[617](#)Annexure OMBR – 2.

[618](#)Annexure OMBR – 3.

[619](#)Annexure OMBR – 15.

[620](#)Annexure OMBR – 16. Ms Strangio’s decision was affirmed by Marco Spaccavento, the former Assistant Commissioner for Workplace Relations at the Australian Public Service Commission: Annexure OMBR – 18.

[621](#)Annexure OMBR – 6.

[622](#)Annexure OMBR – 7.

[623](#)Annexure OMBR – 8.

[624](#)Annexure OMBR – 8.

[625](#)Annexure OMBR – 19.

[626](#)Annexure OMBR – 20.

[627](#)Annexure OMBR – 21.

[628](#)Annexure OMBR – 22; Annexure OMBR – 23.

[629](#)Annexure OMBR – 22.

[630](#)Annexure OMBR – 23.

[631](#)Annexure OMBR – 4.

[632](#)Annexure OMBR – 5.

[633](#)Annexure OMBR – 1.

[634](#)Annexure OMBR – 17.

[635](#)Annexure OMBR – 16. Ms Strangio’s decision was affirmed by Marco Spaccavento, the former Assistant Commissioner for Workplace Relations at the Australian Public Service Commission: Annexure OMBR – 18.

[636](#)Annexure OMBR – 8.

[637](#)Annexure OMBR – 21.

[638](#)Annexure OMBR – 22; Annexure OMBR – 23.

[639](#)Annexure OMBR – 3.

[640](#)Annexure OMBR – 3.

[641](#)Annexure OMBR – 5.

[642](#)Annexure EDR – 11; Annexure EDR – 46B.

[643](#)As to which, please refer to part VIII of this email.

[644](#)Annexure EDR – 93.

[645](#)See *Public Interest Disclosure Standard 2013* (Cth), s 12, and notations contained therein.

[646](#)*Public Service Classification Rules 2000* (Cth), r 9(1).

[647](#)*Public Service Classification Rules 2000* (Cth), rr 9(2) and 9(2A).

[648](#)*Public Service Classification Rules 2000* (Cth), r 9(1).

[649](#)*Public Service Classification Rules 2000* (Cth), rr 9(2) and 9(2A).

[650](#)As to which, please refer to

[https://www.righttoknow.org.au/request/vacancy\\_notification\\_for\\_ongoing#incoming-28916](https://www.righttoknow.org.au/request/vacancy_notification_for_ongoing#incoming-28916), where B Henderson of the Federal Court of Australia refuses to provide access to “the ongoing, full-time, SES Band 1 classified National Judicial Registrar vacancy notification, published in the Public Service Gazette, that Susan O’Connor was selected to fill in the course of a merit based selection process for that ongoing, full-time, SES Band 1 classified National Judicial Registrar vacancy” that the access applicant requested because the document does not exist.

651As to which, please refer to B Henderson's freedom of information decision on Right to Know:  
[https://www.righttoknow.org.au/request/vacancy\\_notification\\_for\\_ongoing#incoming-28916](https://www.righttoknow.org.au/request/vacancy_notification_for_ongoing#incoming-28916).

652The National Judicial Registrar & District Registrar roles are altogether different to the National Judicial Registrar roles in the Federal Court of Australia because the people engaged or promoted to the National Judicial Registrar & District Registrar roles in the Federal Court are appointed to the office of District Registrar under paragraph 18N(1)(a) of the *Federal Court of Australia Act 1976* (Cth), which provides that "in addition to the Chief Executive Officer, there are the following officers of the Court: a District Registrar of the Court for each District Registry."

A brief glance at, for example, page 129 of the 2018-2019 annual report of the Federal Court of Australia, which can be accessed at [www.fedcourt.gov.au/digital-law-library/annual-reports](http://www.fedcourt.gov.au/digital-law-library/annual-reports), shows that Murray Belcher and Russell Trott were appointed to the offices of "District Registrar (QLD District Registry), Federal Court of Australia" and "District Registrar (WA District Registry), Federal Court of Australia" pursuant to paragraph 18N(1)(a) of the *Federal Court of Australia Act 1976* (Cth).

A brief glance at page 130 of the 2018-2019 annual report of the Federal Court of Australia, which can be accessed at [www.fedcourt.gov.au/digital-law-library/annual-reports](http://www.fedcourt.gov.au/digital-law-library/annual-reports), shows that the National Judicial Registrar role is entirely distinct to the National Judicial Registrar and District Registrar roles and that, unlike the individuals who were engaged as, or promoted to the role of, National Judicial Registrar & District Registrar, not one of the people identified as National Judicial Registrars has been appointed as a District Registrar pursuant to paragraph 18N(1)(a) of the *Federal Court of Australia Act 1976* (Cth). It is readily apparent that the offices to which each of the National Judicial Registrars was appointed to was either the office of Deputy District Registrar, pursuant to paragraph 18N(1)(b) of the *Federal Court of Australia Act 1976* (Cth), or the office of Registrar, pursuant to paragraph 18N(1)(aa) of the *Federal Court of Australia Act 1976* (Cth).

The entries on page 130 of the 2018-2019 annual report of the Federal Court of Australia demonstrate that:

- a) Phillip Allaway was not appointed to the office of District Registrar, but was appointed to the office of "Deputy District Registrar, Federal Court of Australia";
- b) Matthew Benter was not appointed to the office of District Registrar, but was appointed to the office of "Registrar, Federal Court of Australia";
- c) Rupert Burns was not appointed to the office of District Registrar, but was appointed to the office of "Deputy District Registrar, Federal Court of Australia";
- d) Catherine Forbes was not appointed to the office of District Registrar, but was appointed to the office of "Registrar, Federal Court of Australia";

- e) Claire Gitsham was not appointed to the office of District Registrar, but was appointed to the office of “Registrar, Federal Court of Australia”;
- f) Susan O’Connor was not appointed to the office of District Registrar, but was appointed to the office of “Registrar, Federal Court of Australia”;
- g) Katie Stride was not appointed to the office of District Registrar, but was appointed to the office of “Registrar, Federal Court of Australia”.

[653](#)I again stress, because it seems to be lost on Kate McMullan and Mark Anstey, that an officer conducting a public interest disclosure investigation is under a legislative obligation to “ensure that a finding of fact is based on logically probative evidence” (*Public Interest Disclosure Standards 2013* (Cth), s 12(1)), and to “also ensure that the evidence relied on in an investigation is relevant” (*Public Interest Disclosure Standards 2013* (Cth), s 12(2)).

[654](#)Annexure OMBR – 17.

[655](#)Annexure OMBR – 24.

[656](#)Annexure EDR – 100. Notice that Mr Allway did not apply for any other positions.

[657](#)Annexure OMBR – 9.

[658](#)Annexure OMBR – 11.

[659](#)Annexure OMBR – 9.

[660](#)Annexure OMBR – 11. It is impossible to claim that the vacancy notification cannot be found because had the vacancy been notified in the Public Service Gazette, as it should have been pursuant to subsection 20(1) of the *Australian Public Service Commissioner’s Directions 2016* (Cth), Ms Colbran would have plucked the notification from the Public Service Gazette, a publicly accessible record.

[661](#)As Mr Anstey should know, a selection process that is not properly documented (including a failure to document the notification of a role and the applications submitted for that role) contravenes the merit based selection requirement set out in paragraph 10A(1)(c) of the *Public Service Act 1999* (Cth): *Australian Public Service Commissioner’s Directions 2016* (Cth), s 19(1)(d).

[662](#)Annexure EDR – 100.

[663](#)Annexure EDR – 89.

[664](#)Annexure EDR – 104.

[665](#)Annexure EDR – 89.

[666](#)Annexure EDR – 114. Matthew Benter was the Director of MKB Legal Consulting Pty Ltd when he applied to fill the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in the Western Australia District Registry of the Federal Court of Australia.

[667](#)Annexure OMBR – 25.

[668](#)Annexure EDR – 100. Notice that Mr Benter did not apply for any other positions.

[669](#)Annexure OMBR – 9.

[670](#)Annexure OMBR – 11.

[671](#)Annexure OMBR – 21.

[672](#)Annexure OMBR – 23; Annexure OMBR – 22. It is impossible to claim that the vacancy notification cannot be found because had the vacancy been notified in the Public Service Gazette, as it should have been pursuant to subsection 20(1) of the *Australian Public Service Commissioner's Directions 2016* (Cth), Ms Colbran would have plucked the notification from the Public Service Gazette, a publicly accessible record.

[673](#)As Mr Anstey should know, a selection process that is not properly documented (including a failure to document the notification of a role and the applications submitted for that role) contravenes the merit based selection requirement set out in paragraph 10A(1)(c) of the *Public Service Act 1999* (Cth): *Australian Public Service Commissioner's Directions 2016* (Cth), s 19(1)(d).

[674](#)Annexure EDR – 100.

[675](#)Annexure EDR – 111.

[676](#)Annexure EDR – 111.

[677](#)Annexure EDR – 108. Claire Gitsham was a partner in the dispute resolution team at Thomson Geer when she applied to fill the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in the Victoria District Registry of the Federal Court of Australia.

[678](#)Annexure OMBR – 13; Annexure OMBR – 14.

[679](#)Annexure EDR – 90; Annexure EDR – 100.

[680](#)Annexure OMBR – 14.

[681](#)Annexure OMBR – 13.

[682](#)Annexure OMBR – 9.

[683](#)Annexure OMBR – 11.

[684](#)Annexure OMBR – 21.

[685](#)Annexure OMBR – 23; Annexure OMBR – 22. It is practically impossible to claim that the vacancy notification cannot be found because had the vacancy been notified in the Public Service Gazette, as it should have been pursuant to subsection 20(1) of the *Australian Public Service Commissioner's Directions 2016* (Cth), Ms Colbran would have plucked the notification from the Public Service Gazette, a publicly accessible record.

[686](#)As Mr Anstey should know, a selection process that is not properly documented (including a failure to document the notification of a role and the applications submitted for that role) contravenes the merit based selection requirement set out in paragraph 10A(1)(c) of the *Public Service Act 1999* (Cth): *Australian Public Service Commissioner's Directions 2016* (Cth), s 19(1)(d).

[687](#)Annexure EDR – 90.

[688](#)Annexure EDR – 100.

[689](#)Annexure EDR – 104.

[690](#)Annexure EDR – 104.

[691](#)If Mr Anstey had bothered engaging with my External Disclosure Report – specifically, part 5.5.1 of the report – then he would know that APS employees are employed by the Commonwealth of Australia, and not a Statutory Agency, which does not have a legal identity distinct to the Commonwealth.

[692](#)External Disclosure Report, part 7.6.1.

[693](#)Annexure EDR – 127.

[694](#)Annexure EDR – 127.

[695](#)Annexure EDR – 127.

[696](#)Annexure EDR – 127.

[697](#)Annexure EDR – 127.

[698](#)Annexure EDR – 127.

[699](#)Annexure EDR – 127.

[700](#)Annexure EDR – 127.

[701](#)Annexure EDR – 1.

[702](#) *Fisher v Hebburn* (1960) 105 CLR 188, 194.

[703](#)*Public Service Classification Rules 2000* (Cth), r 9(2).

[704](#)*Public Service Classification Rules 2000* (Cth), r 9(2A).

[705](#)*Public Service Classification Rules 2000* (Cth), r 9(1).

[706](#)*Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 490, [69] – [70].

[707](#)Annexure EDR – 127.

[708](#)Annexure EDR – 127.

[709](#)Annexure EDR – 127.

[710](#)External Disclosure Report, part 7.5.2.2.

[711](#)Annexure OMBR – 21.

[712](#)Annexure OMBR – 23; Annexure OMBR – 22. It would practically impossible to claim that the document cannot be found because if it had been published in the Public Service Gazette, I would have been able to find it and Ms Colbran would have been able to find it and provide access to it.

[713](#)Annexure OMBR – 9.

[714](#)Annexure OMBR – 11.

[715](#)Annexure EDR – 107.

[716](#)Annexure OMBR – 23.

[717](#)Annexure OMBR – 11.

[718](#)Annexure EDR – 107.

[719](#)Annexure EDR – 105.

[720](#)Annexure OMBR – 1.

[721](#)Annexure OMBR – 25; Annexure EDR – 100, page 4. Notice that Matthew Benter is recorded as **only** having applied for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in the Western Australia District Registry of the Federal Court of Australia.

[722](#)Annexure OMBR – 9; Annexure OMBR – 11.

[723](#)Annexure EDR – 98.

[724](#)Annexure EDR – 111.

[725](#)Annexure EDR – 100.

[726](#)Annexure EDR – 111.

[727](#)Annexure EDR – 111.

[728](#)Annexure EDR – 111.

[729](#)Annexure EDR – 111.

[730](#)Annexure EDR – 111.

[731](#)Annexure EDR – 111.

[732](#)Annexure EDR – 111.

[733](#)Annexure EDR – 113.

[734](#)Annexure EDR – 113.

[735](#)Annexure EDR – 113; Annexure EDR – 111.

[736](#)Annexure EDR – 93; Annexure EDR – 95.

[737](#)Annexure EDR – 113; Annexure EDR – 107.

[738](#)Please refer to *Australian Public Service Classification Guide*, Part Three: Work Level Standards – Key concepts, which provides that “[t]he appropriate classification of a job should be determined based on the **complexity** and **responsibility** of tasks involved.”

[739](#)Annexure EDR – 113.

[740](#)Annexure EDR – 11.

[741](#)Annexure EDR – 11.

[742](#)Annexure EDR – 11.

[743](#)Annexure EDR – 11.

[744](#)External Disclosure Report, part 7.5.2.2.

[745](#)It has already been demonstrated that there was no role review conducted for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – QLD role and the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – WA role because, in response to requests for access to role evaluation records that show that the SES Band 1 classified National Judicial Registrar & District Registrar roles in Queensland and Western Australia were, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated Executive Level 2 classifications for the purposes of rule 9 of the *Public Service Classification Rules 2000*, a decision maker in the Federal Court of Australia has refused to provide the documents because they do not exist:

[https://www.righttoknow.org.au/request/role\\_evaluation\\_records\\_for\\_nati#incoming-29274](https://www.righttoknow.org.au/request/role_evaluation_records_for_nati#incoming-29274).

[746](#)External Disclosure Report, part 7.5.2.2, and paragraphs 977 – 989 in particular.

[747](#)External Disclosure Report, part 7.5.2.2, and paragraph 966 in particular.

[748](#)*Australian Public Service Commissioner's Directions 2016* (Cth), s 20(1)(a).

[749](#)*Australian Public Service Commissioner's Directions 2016* (Cth), s 20(1)(b).

[750](#)*Australian Public Service Commissioner's Directions 2016* (Cth), s 19(1)(a).

[751](#)*Australian Public Service Commissioner's Directions 2016* (Cth), s 19(1)(b).

[752](#)*Australian Public Service Commissioner's Directions 2016* (Cth), s 19(1)(d).

[753](#)External Disclosure Report, part 7.5.2.2.

[754](#)As to the legislative requirement that findings be made on the basis of logically probative and relevant evidence, please refer to *Public Interest Disclosure Standard 2013* (Cth), s 12.

[755](#)External Disclosure Report, part 7.5.1.

[756](#)Annexure OMBR – 1.

[757](#)Annexure OMBR – 1.

[758](#)Annexure OMBR – 1.

[759](#)Annexure OMBR – 1.

[760](#)Annexure OMBR – 1.

[761](#)Letter from Mark Anstey to discloser.

[762](#)External Disclosure Report, part 7.5.2.2.

[763](#)Annexure EDR – 93.

[764](#)Annexure EDR – 93, first page.

[765](#)Annexure EDR – 93, fifth page.

[766](#)Annexure EDR – 93, fifth page.

[767](#)Annexure EDR – 93, fifth page.

[768](#)Annexure EDR – 93; Annexure EDR – 129.

[769](#)Annexure EDR – 129.

[770](#)Annexure EDR – 93, fifth page.

[771](#)Annexure EDR – 93, fifth page.

[772](#)Annexure EDR – 93, fourth and fifth pages.

[773](#)Annexure EDR – 93, fourth page.

[774](#)Annexure EDR – 93, fourth and fifth pages.

[775](#)Annexure EDR – 93; Annexure EDR – 104.

[776](#)Annexure EDR – 104.

[777](#)Annexure EDR – 93, fifth page.

[778](#)Annexure EDR – 93, fifth page.

[779](#)Annexure EDR – 93, fifth page.

[780](#)Annexure EDR – 93; Annexure EDR – 111.

[781](#)Annexure EDR – 111.

[782](#)Annexure EDR – 93, fifth page.

[783](#)Annexure EDR – 93, fifth page.

[784](#)Annexure EDR – 93, fourth and fifth pages; Annexure EDR – 104.

[785](#)Annexure EDR – 93, fifth page.

[786](#)Annexure EDR – 93, fifth page.

[787](#)Annexure EDR – 93, fifth page.

[788](#)*Public Service Act 1999* (Cth), s 41(1)(a).

[789](#)*Public Service Act 1999* (Cth), s 41(1)(b).

[790](#)*Public Service Act 1999* (Cth), s 41(2)(c).

[791](#)*Public Service Act 1999* (Cth), s 41(2)(r).

[792](#)*Australian Public Service Classification Guide*, Part 4, “Documentation”.

[793](#)*Australian Public Service Classification Guide*, Part 4, “Documentation”.

[794](#)*Australian Public Service Classification Guide*, Part 2, “Documenting classification decisions”.

[795](#)*Australian Public Service Classification Guide*, Part 2, “Documenting classification decisions”.

[796](#)*Public Service Act 1999* (Cth), s 14.

[797](#)*Public Service Act 1999* (Cth), s 14.

[798](#)*Public Service Act 1999* (Cth), s 13(11)(a).

[799](#)*Australian Public Service Commissioner’s Guidelines 2016* (Cth), s 14(e).

[800](#)Annexure OMBR – 3.

[801](#)Annexure EDR – 93, eighth page.

[802](#)*Federal Court of Australia Act 1976* (Cth), s 34(3).

[803](#)Annexure EDR – 95; Annexure EDR – 96.

[804](#)Annexure OMBR – 3.

[805](#)*Public Interest Disclosure Standard 2013* (Cth), s 12(1).

[806](#)*Public Interest Disclosure Standard 2013* (Cth), s 12(2).

[807](#)Annexure OMBR – 17.

[808](#)Annexure OMBR – 2.

[809](#)Annexure OMBR – 3.

[810](#)Annexure OMBR – 15.

[811](#)Annexure OMBR – 16. Ms Strangio’s decision was affirmed by Marco Spaccavento, the former Assistant Commissioner for Workplace Relations at the Australian Public Service Commission: Annexure OMBR – 18.

[812](#)Annexure OMBR – 16.

[813](#)Annexure OMBR – 6.

[814](#)Annexure OMBR – 7.

[815](#)Annexure OMBR – 8.

[816](#)Annexure OMBR – 8.

[817](#)Annexure OMBR – 19.

[818](#)Annexure OMBR – 20.

[819](#)Annexure OMBR – 21.

[820](#)Annexure OMBR – 22; Annexure OMBR – 23.

[821](#)Annexure OMBR – 22.

[822](#)Annexure OMBR – 23.

[823](#)Annexure OMBR – 4.

[824](#)Annexure OMBR – 5.

[825](#)Annexure OMBR – 1.

[826](#)Annexure OMBR – 17.

[827](#)Annexure OMBR – 16; Annexure OMBR – 18.

[828](#)Annexure OMBR – 8.

[829](#)Annexure OMBR – 21.

[830](#)Annexure OMBR – 22; Annexure OMBR – 23.

[831](#)Annexure OMBR – 3.

[832](#)Annexure OMBR – 3.

[833](#)Annexure OMBR – 5.

[834](#)Annexure EDR – 11; Annexure EDR – 46B.

[835](#)As to which, please refer to part VIII of this email.

[836](#)Annexure EDR – 93.

[837](#)See *Public Interest Disclosure Standard 2013* (Cth), s 12, and notations contained therein.

[838](#)*Public Service Classification Rules 2000* (Cth), r 9(1).

[839](#)*Public Service Classification Rules 2000* (Cth), rr 9(2) and 9(2A).

[840](#)*Public Service Classification Rules 2000* (Cth), r 9(1).

[841](#)*Public Service Classification Rules 2000* (Cth), rr 9(2) and 9(2A).

[842](#)As to which, please refer to

[https://www.righttoknow.org.au/request/vacancy\\_notification\\_for\\_ongoing#incoming-28916](https://www.righttoknow.org.au/request/vacancy_notification_for_ongoing#incoming-28916), where B Henderson of the Federal Court of Australia refuses to provide access to “the ongoing, full-time, SES Band 1 classified National Judicial Registrar vacancy notification, published in the Public Service Gazette, that Susan O’Connor was selected to fill in the course of a merit based selection process for that ongoing, full-time, SES Band 1 classified National Judicial Registrar vacancy” that the access applicant requested because the document does not exist.

[843](#)As to which, please refer to B Henderson’s freedom of information decision on Right to Know:

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[844](#)The National Judicial Registrar & District Registrar roles are altogether different to the National Judicial Registrar roles in the Federal Court of Australia because the people engaged or promoted to the National Judicial Registrar & District Registrar roles in the Federal Court are appointed to the office of District Registrar under paragraph 18N(1)(a) of the *Federal Court of Australia Act 1976* (Cth), which provides that “in addition to the Chief Executive Officer, there are the following officers of the Court: a District Registrar of the Court for each District Registry.”

A brief glance at, for example, page 129 of the 2018-2019 annual report of the Federal Court of Australia, which can be accessed at [www.fedcourt.gov.au/digital-law-library/annual-reports](http://www.fedcourt.gov.au/digital-law-library/annual-reports), shows that Murray Belcher and Russell Trott were appointed to the offices of “District Registrar (QLD District Registry), Federal Court of Australia” and “ District Registrar (WA District Registry), Federal Court of Australia” pursuant to paragraph 18N(1)(a) of the *Federal Court of Australia Act 1976* (Cth).

A brief glance at page 130 of the 2018-2019 annual report of the Federal Court of Australia, which can be accessed at [www.fedcourt.gov.au/digital-law-library/annual-reports](http://www.fedcourt.gov.au/digital-law-library/annual-reports), shows that the National Judicial Registrar role is entirely distinct to the National Judicial Registrar and District

Registrar roles and that, unlike the individuals who were engaged as, or promoted to the role of, National Judicial Registrar & District Registrar, not one of the people identified as National Judicial Registrars has been appointed as a District Registrar pursuant to paragraph 18N(1)(a) of the *Federal Court of Australia Act 1976* (Cth). It is readily apparent that the offices to which each of the National Judicial Registrars was appointed to was either the office of Deputy District Registrar, pursuant to paragraph 18N(1)(b) of the *Federal Court of Australia Act 1976* (Cth), or the office of Registrar, pursuant to paragraph 18N(1)(aa) of the *Federal Court of Australia Act 1976* (Cth).

The entries on page 130 of the 2018-2019 annual report of the Federal Court of Australia demonstrate that:

- a) Phillip Allaway was not appointed to the office of District Registrar, but was appointed to the office of “Deputy District Registrar, Federal Court of Australia”;
- b) Matthew Benter was not appointed to the office of District Registrar, but was appointed to the office of “Registrar, Federal Court of Australia”;
- c) Rupert Burns was not appointed to the office of District Registrar, but was appointed to the office of “Deputy District Registrar, Federal Court of Australia”;
- d) Catherine Forbes was not appointed to the office of District Registrar, but was appointed to the office of “Registrar, Federal Court of Australia”;
- e) Claire Gitsham was not appointed to the office of District Registrar, but was appointed to the office of “Registrar, Federal Court of Australia”;
- f) Susan O’Connor was not appointed to the office of District Registrar, but was appointed to the office of “Registrar, Federal Court of Australia”;
- g) Katie Stride was not appointed to the office of District Registrar, but was appointed to the office of “Registrar, Federal Court of Australia”.

[845](#)I again stress, because it seems to be lost on Kate McMullan and Mark Anstey, that an officer conducting a public interest disclosure investigation is under a legislative obligation to “ensure that a finding of fact is based on logically probative evidence” (*Public Interest Disclosure Standards 2013* (Cth), s 12(1)), and to “also ensure that the evidence relied on in an investigation is relevant” (*Public Interest Disclosure Standards 2013* (Cth), s 12(2)).

[846](#)Annexure OMBR – 17.

[847](#)Annexure OMBR – 24.

[848](#)Annexure EDR – 100. Notice that Mr Allway did not apply for any other positions.

[849](#)Annexure OMBR – 9.

[850](#)Annexure OMBR – 11.

[851](#)Annexure OMBR – 9.

[852](#)Annexure OMBR – 11. It is impossible to claim that the vacancy notification cannot be found because had the vacancy been notified in the Public Service Gazette, as it should have been pursuant to subsection 20(1) of the *Australian Public Service Commissioner's Directions 2016* (Cth), Ms Colbran would have plucked the notification from the Public Service Gazette, a publicly accessible record.

[853](#)As Mr Anstey should know, a selection process that is not properly documented (including a failure to document the notification of a role and the applications submitted for that role) contravenes the merit based selection requirement set out in paragraph 10A(1)(c) of the *Public Service Act 1999* (Cth): *Australian Public Service Commissioner's Directions 2016* (Cth), s 19(1)(d).

[854](#)Annexure EDR – 100.

[855](#)Annexure EDR – 89.

[856](#)Annexure EDR – 104.

[857](#)Annexure EDR – 89.

[858](#)Annexure EDR – 108. Claire Gitsham was a partner in the dispute resolution team at Thomson Geer when she applied to fill the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in the Victoria District Registry of the Federal Court of Australia.

[859](#)Annexure OMBR – 13; Annexure OMBR – 14.

[860](#)Annexure EDR – 90; Annexure EDR – 100.

[861](#)Annexure OMBR – 14.

[862](#)Annexure OMBR – 13.

[863](#)Annexure OMBR – 9.

[864](#)Annexure OMBR – 11.

[865](#)Annexure OMBR – 21.

[866](#)Annexure OMBR – 23; Annexure OMBR – 22. It is practically impossible to claim that the vacancy notification cannot be found because had the vacancy been notified in the Public Service Gazette, as it should have been pursuant to subsection 20(1) of the *Australian Public Service Commissioner's Directions 2016* (Cth), Ms Colbran would have plucked the notification from the Public Service Gazette, a publicly accessible record.

[867](#)As Mr Anstey should know, a selection process that is not properly documented (including a failure to document the notification of a role and the applications submitted for that role) contravenes the merit based selection requirement set out in paragraph 10A(1)(c) of the *Public Service Act 1999* (Cth): *Australian Public Service Commissioner's Directions 2016* (Cth), s 19(1)(d).

[868](#)Annexure EDR – 90.

[869](#)Annexure EDR – 100.

[870](#)Annexure EDR – 104.

[871](#)Annexure EDR – 104.

[872](#)Annexure EDR – 114. Matthew Benter was the Director of MKB Legal Consulting Pty Ltd when he applied to fill the Senior Executive Band 1 classified National Judicial Registrar & District Registrar vacancy in the Western Australia District Registry of the Federal Court of Australia.

[873](#)Annexure OMBR – 25.

[874](#)Annexure EDR – 100. Notice that Mr Benter did not apply for any other positions.

[875](#)Annexure OMBR – 9.

[876](#)Annexure OMBR – 11.

[877](#)Annexure OMBR – 21.

[878](#)Annexure OMBR – 23; Annexure OMBR – 22. It is impossible to claim that the vacancy notification cannot be found because had the vacancy been notified in the Public Service Gazette, as it should have been pursuant to subsection 20(1) of the *Australian Public Service Commissioner's Directions 2016* (Cth), Ms Colbran would have plucked the notification from the Public Service Gazette, a publicly accessible record.

[879](#)As Mr Anstey should know, a selection process that is not properly documented (including a failure to document the notification of a role and the applications submitted for that role) contravenes the merit based selection requirement set out in paragraph 10A(1)(c) of the *Public Service Act 1999* (Cth): *Australian Public Service Commissioner's Directions 2016* (Cth), s 19(1)(d).

[880](#)Annexure EDR – 100.

[881](#)Annexure EDR – 111.

[882](#)Annexure EDR – 111.

[883](#)If Mr Anstey had bothered engaging with my External Disclosure Report – specifically, part 5.5.1 of the report – then he would know that APS employees are employed by the Commonwealth of Australia, and not a Statutory Agency, which does not have a legal identity distinct to the Commonwealth.

[884](#)Annexure EDR – 127.

[885](#)Annexure EDR – 127.

[886](#)Annexure EDR – 127.

[887](#)External Disclosure Report, part 7.5.2.2.

[888](#)Annexure OMBR – 21.

[889](#)Annexure OMBR – 23; Annexure OMBR – 22. It would practically impossible to claim that the document cannot be found because if it had been published in the Public Service Gazette, I would have been able to find it and Ms Colbran would have been able to find it and provide access to it.

[890](#)Annexure OMBR – 9.

[891](#)Annexure OMBR – 11.

[892](#)Annexure EDR – 113.

[893](#)Annexure OMBR – 23.

[894](#)Annexure OMBR – 11; Annexure OMBR – 9.

[895](#)Annexure EDR – 113.

[896](#)Annexure EDR – 105.

[897](#)Annexure OMBR – 1.

[898](#)Annexure EDR – 11.

[899](#)External Disclosure Report, part 7.5.2.2.

[900](#)It has already been demonstrated that there was no role review conducted for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – QLD role and the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – WA role because, in response to requests for access to role evaluation records that show that the SES Band 1 classified National Judicial Registrar & District Registrar roles in Queensland and Western Australia were, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated Executive Level 2 classifications for the purposes of rule 9 of the *Public Service Classification Rules 2000*, a decision maker in the Federal Court of Australia has refused to provide the documents because they do not exist:

[https://www.righttoknow.org.au/request/role\\_evaluation\\_records\\_for\\_nati#incoming-29274](https://www.righttoknow.org.au/request/role_evaluation_records_for_nati#incoming-29274).

[901](#)External Disclosure Report, part 7.5.2.2, and paragraphs 977 – 989 in particular.

[902](#)External Disclosure Report, part 7.5.2.2, and paragraph 966 in particular.

[903](#)*Australian Public Service Commissioner's Directions 2016* (Cth), s 20(1)(a).

[904](#)*Australian Public Service Commissioner's Directions 2016* (Cth), s 20(1)(b).

[905](#)*Australian Public Service Commissioner's Directions 2016* (Cth), s 19(1)(a).

[906](#)*Australian Public Service Commissioner's Directions 2016* (Cth), s 19(1)(b).

[907](#)*Australian Public Service Commissioner's Directions 2016* (Cth), s 19(1)(d).

[908](#)External Disclosure Report, part 7.5.2.2.

[909](#)As to the legislative requirement that findings be made on the basis of logically probative and relevant evidence, please refer to *Public Interest Disclosure Standard 2013* (Cth), s 12.

[910](#)External Disclosure Report, part 7.5.1.

[911](#)Annexure OMBR – 1.

[912](#)Annexure OMBR – 1.

[913](#)Annexure OMBR – 1.

[914](#)Annexure OMBR – 1.

[915](#)Annexure OMBR – 1.

[916](#)Annexure OMBR – 1.

[917](#)External Disclosure Report, part 7.5.2.2.

[918](#)Annexure EDR – 93.

[919](#)Annexure EDR – 93, first page.

[920](#)Annexure EDR – 93, fifth page.

[921](#)Annexure EDR – 93, fifth page.

[922](#)Annexure EDR – 93, fifth page.

[923](#)Annexure EDR – 93; Annexure EDR – 129.

[924](#)Annexure EDR – 129.

[925](#)Annexure EDR – 93, fifth page.

[926](#)Annexure EDR – 93, fifth page.

[927](#)Annexure EDR – 93, fifth page.

[928](#)Annexure EDR – 93, fifth page.

[929](#)Annexure EDR – 93, fifth page.

[930](#)Annexure EDR – 93; Annexure EDR – 111.

[931](#)Annexure EDR – 111.

[932](#)Annexure EDR – 93, fifth page.

[933](#)Annexure EDR – 93, fifth page.

[934](#)Annexure EDR – 93, fourth and fifth pages.

[935](#)Annexure EDR – 93, fourth page.

[936](#)Annexure EDR – 93, fourth and fifth pages.

[937](#)Annexure EDR – 93; Annexure EDR – 104.

[938](#)Annexure EDR – 104.

[939](#)Annexure EDR – 93, fourth and fifth pages; Annexure EDR – 104.

[940](#)Annexure EDR – 93, fifth page.

[941](#)Annexure EDR – 93, fifth page.

[942](#)Annexure EDR – 93, fifth page.

[943](#)*Public Service Act 1999* (Cth), s 41(1)(a).

[944](#)*Public Service Act 1999* (Cth), s 41(1)(b).

[945](#)*Public Service Act 1999* (Cth), s 41(2)(c).

[946](#)*Public Service Act 1999* (Cth), s 41(2)(r).

[947](#)*Australian Public Service Classification Guide*, Part 4, “Documentation”.

[948](#)*Australian Public Service Classification Guide*, Part 4, “Documentation”.

[949](#)*Australian Public Service Classification Guide*, Part 2, “Documenting classification decisions”.

[950](#)*Australian Public Service Classification Guide*, Part 2, “Documenting classification decisions”.

[951](#)*Public Service Act 1999* (Cth), s 14.

[952](#)*Public Service Act 1999* (Cth), s 14.

[953](#)*Public Service Act 1999* (Cth), s 13(11)(a).

[954](#)*Australian Public Service Commissioner’s Guidelines 2016* (Cth), s 14(e).

[955](#)Annexure OMBR – 3.

[956](#)Annexure EDR – 93, eighth page.

[957](#)*Federal Court of Australia Act 1976* (Cth), s 34(3).

[958](#)Annexure EDR – 95; Annexure EDR – 96.

[959](#)Annexure OMBR – 3.

[960](#)*Public Interest Disclosure Standard 2013* (Cth), s 12(1).

[961](#)*Public Interest Disclosure Standard 2013* (Cth), s 12(2).

[962](#)Annexure OMBR – 17.

[963](#)Annexure OMBR – 2.

[964](#)Annexure OMBR – 3.

[965](#)Annexure OMBR – 15.

[966](#)Annexure OMBR – 16. Ms Strangio’s decision was affirmed by Marco Spaccavento, the former Assistant Commissioner for Workplace Relations at the Australian Public Service Commission: Annexure OMBR – 18.

[967](#)Annexure OMBR – 16.

[968](#)Annexure OMBR – 6.

[969](#)Annexure OMBR – 7.

[970](#)Annexure OMBR – 8.

[971](#)Annexure OMBR – 8.

[972](#)Annexure OMBR – 19.

[973](#)Annexure OMBR – 20.

[974](#)Annexure OMBR – 9.

[975](#)Annexure OMBR – 10; Annexure OMBR – 11.

[976](#)Annexure OMBR – 10.

[977](#)Annexure OMBR – 11.

[978](#)Annexure OMBR – 4.

[979](#)Annexure OMBR – 5.

[980](#)Annexure OMBR – 1.

[981](#)Annexure OMBR – 17.

[982](#)Annexure OMBR – 16. Ms Strangio’s decision was affirmed by Marco Spaccavento, the former Assistant Commissioner for Workplace Relations at the Australian Public Service Commission:  
Annexure OMBR – 18.

[983](#)Annexure OMBR – 8.

[984](#)Annexure OMBR – 21.

[985](#)Annexure OMBR – 22; Annexure OMBR – 23.

[986](#)Annexure OMBR – 3.

[987](#)Annexure OMBR – 3.

[988](#)Annexure OMBR – 5.

[989](#)Annexure EDR – 11; Annexure EDR – 46B.

[990](#)As to which, please refer to part VIII of this email.

[991](#)Annexure EDR – 93.

[992](#)See *Public Interest Disclosure Standard 2013* (Cth), s 12, and notations contained therein.

[993](#)*Public Service Classification Rules 2000* (Cth), r 9(1).

[994](#)*Public Service Classification Rules 2000* (Cth), rr 9(2) and 9(2A).

[995](#)*Public Service Classification Rules 2000* (Cth), r 9(1).

[996](#)*Public Service Classification Rules 2000* (Cth), rr 9(2) and 9(2A).

[997](#)As to which, please refer to

[https://www.righttoknow.org.au/request/vacancy\\_notification\\_for\\_ongoing#incoming-28916](https://www.righttoknow.org.au/request/vacancy_notification_for_ongoing#incoming-28916), where B Henderson of the Federal Court of Australia refuses to provide access to “the ongoing, full-time, SES Band 1 classified National Judicial Registrar vacancy notification, published in the Public Service Gazette, that Susan O’Connor was selected to fill in the course of a merit based selection process for that ongoing, full-time, SES Band 1 classified National Judicial Registrar vacancy” that the access applicant requested because the document does not exist.

[998](#)As to which, please refer to B Henderson’s freedom of information decision on Right to Know:

[https://www.righttoknow.org.au/request/vacancy\\_notification\\_for\\_ongoing#incoming-28916](https://www.righttoknow.org.au/request/vacancy_notification_for_ongoing#incoming-28916).

[999](#)The National Judicial Registrar & District Registrar roles are altogether different to the National Judicial Registrar roles in the Federal Court of Australia because the people engaged or promoted to the National Judicial Registrar & District Registrar roles in the Federal Court are appointed to the office of District Registrar under paragraph 18N(1)(a) of the *Federal Court of Australia Act*

1976 (Cth), which provides that “in addition to the Chief Executive Officer, there are the following officers of the Court: a District Registrar of the Court for each District Registry.”

A brief glance at, for example, page 129 of the 2018-2019 annual report of the Federal Court of Australia, which can be accessed at [www.fedcourt.gov.au/digital-law-library/annual-reports](http://www.fedcourt.gov.au/digital-law-library/annual-reports), shows that Murray Belcher and Russell Trott were appointed to the offices of “District Registrar (QLD District Registry), Federal Court of Australia” and “ District Registrar (WA District Registry), Federal Court of Australia” pursuant to paragraph 18N(1)(a) of the *Federal Court of Australia Act 1976* (Cth).

A brief glance at page 130 of the 2018-2019 annual report of the Federal Court of Australia, which can be accessed at [www.fedcourt.gov.au/digital-law-library/annual-reports](http://www.fedcourt.gov.au/digital-law-library/annual-reports), shows that the National Judicial Registrar role is entirely distinct to the National Judicial Registrar and District Registrar roles and that, unlike the individuals who were engaged as, or promoted to the role of, National Judicial Registrar & District Registrar, not one of the people identified as National Judicial Registrars has been appointed as a District Registrar pursuant to paragraph 18N(1)(a) of the *Federal Court of Australia Act 1976* (Cth). It is readily apparent that the offices to which each of the National Judicial Registrars was appointed to was either the office of Deputy District Registrar, pursuant to paragraph 18N(1)(b) of the *Federal Court of Australia Act 1976* (Cth), or the office of Registrar, pursuant to paragraph 18N(1)(aa) of the *Federal Court of Australia Act 1976* (Cth).

The entries on page 130 of the 2018-2019 annual report of the Federal Court of Australia demonstrate that:

- a) Phillip Allaway was not appointed to the office of District Registrar, but was appointed to the office of “Deputy District Registrar, Federal Court of Australia”;
- b) Matthew Benter was not appointed to the office of District Registrar, but was appointed to the office of “Registrar, Federal Court of Australia”;
- c) Rupert Burns was not appointed to the office of District Registrar, but was appointed to the office of “Deputy District Registrar, Federal Court of Australia”;
- d) Catherine Forbes was not appointed to the office of District Registrar, but was appointed to the office of “Registrar, Federal Court of Australia”;
- e) Claire Gitsham was not appointed to the office of District Registrar, but was appointed to the office of “Registrar, Federal Court of Australia”;
- f) Susan O’Connor was not appointed to the office of District Registrar, but was appointed to the office of “Registrar, Federal Court of Australia”;
- g) Katie Stride was not appointed to the office of District Registrar, but was appointed to the office of “Registrar, Federal Court of Australia”.

[1000](#)I again stress, because it seems to be lost on Kate McMullan and Mark Anstey, that an officer conducting a public interest disclosure investigation is under a legislative obligation to “ensure that a finding of fact is based on logically probative evidence” (*Public Interest Disclosure Standards 2013* (Cth), s 12(1)), and to “also ensure that the evidence relied on in an investigation is relevant” (*Public Interest Disclosure Standards 2013* (Cth), s 12(2)).

[1001](#)Annexure OMBR – 17.

[1002](#)Annexure OMBR – 26.

[1003](#)*Public Service Classification Rules 2000* (Cth), r 9(2).

[1004](#)*Public Service Classification Rules 2000* (Cth), r 9(2A).

[1005](#)*Public Service Classification Rules 2000* (Cth), r 9(1).

[1006](#)As to which, please refer to the annual reports of the Federal Court of Australia (2007 – 2008 to 2013 – 2014) on the website of the Federal Court of Australia [www.fedcourt.gov.au/digital-law-library/annual-reports](http://www.fedcourt.gov.au/digital-law-library/annual-reports).

[1007](#)See vacancy NN 10725159 in Public Service Gazette PS 19 of 2018, 10 May 2018, pages 34 – 36.

[1008](#)See vacancy NN 10725241 in Public Service Gazette PS 19 of 2018, 10 May 2018, pages 43 – 44.

[1009](#)See vacancy NN 10721366 in Public Service Gazette PS 10 of 2018, 8 March 2018, pages 23 – 24.

[1010](#)Annexure OMBR – 27.

[1011](#)Annexure OMBR – 27.

[1012](#)Annexure OMBR – 27.

[1013](#)Annexure EDR – 127.

[1014](#)Annexure EDR – 127.

[1015](#)Annexure EDR – 127.

[1016](#)Annexure EDR – 127.

[1017](#)Annexure EDR – 127.

[1018](#)External Disclosure Report, part 7.5.2.2.

[1019](#)Annexure OMBR – 9.

[1020](#)Annexure OMBR – 11. It would practically impossible to claim that the document cannot be found because if it had been published in the Public Service Gazette, I would have been able to find it and Ms Colbran would have been able to find it and provide access to it.

[1021](#)Annexure OMBR – 9.

[1022](#)Annexure OMBR – 11.

[1023](#)Annexure OMBR – 9; Annexure OMBR – 11.

[1024](#)Annexure OMBR – 9; Annexure OMBR – 11.

[1025](#)Annexure OMBR – 1.

[1026](#)Annexure EDR – 11.

[1027](#)External Disclosure Report, part 7.5.2.2.

[1028](#)It has already been demonstrated that there was no role review conducted for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – QLD role and the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – WA role because, in response to requests for access to role evaluation records that show that the SES Band 1 classified National Judicial Registrar & District Registrar roles in Queensland and Western Australia were, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated Executive Level 2 classifications for the purposes of rule 9 of the *Public Service Classification Rules 2000*, a decision maker in the Federal Court of Australia has refused to provide the documents because they do not exist:

[https://www.righttoknow.org.au/request/role\\_evaluation\\_records\\_for\\_nati#incoming-29274](https://www.righttoknow.org.au/request/role_evaluation_records_for_nati#incoming-29274).

[1029](#)External Disclosure Report, part 7.5.2.2, and paragraphs 977 – 989 in particular.

[1030](#)External Disclosure Report, part 7.5.2.2, and paragraph 966 in particular.

[1031](#)*Australian Public Service Commissioner's Directions 2016* (Cth), s 20(1)(a).

[1032](#)*Australian Public Service Commissioner's Directions 2016* (Cth), s 20(1)(b).

[1033](#)*Australian Public Service Commissioner's Directions 2016* (Cth), s 19(1)(a).

[1034](#)*Australian Public Service Commissioner's Directions 2016* (Cth), s 19(1)(b).

[1035](#)*Australian Public Service Commissioner's Directions 2016* (Cth), s 19(1)(d).

[1036](#)External Disclosure Report, part 7.5.2.2.

[1037](#)As to the legislative requirement that findings be made on the basis of logically probative and relevant evidence, please refer to *Public Interest Disclosure Standard 2013* (Cth), s 12.

[1038](#)External Disclosure Report, part 7.5.1.

[1039](#)Annexure OMBR – 1.

[1040](#)Annexure OMBR – 1.

[1041](#)Annexure OMBR – 1.

[1042](#)Annexure OMBR – 1.

[1043](#)Annexure OMBR – 1.

[1044](#)Annexure OMBR – 1.

[1045](#)Annexure EDR – 11.

[1046](#)External Disclosure Report, part 7.5.2.2.

[1047](#)It has already been demonstrated that there was no role review conducted for the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – QLD role and the

Senior Executive Band 1 classified National Judicial Registrar & District Registrar – WA role because, in response to requests for access to role evaluation records that show that the SES Band 1 classified National Judicial Registrar & District Registrar roles in Queensland and Western Australia were, in light of the work value of the group of duties described in the work level standards and a proper job analysis, reclassified and allocated Executive Level 2 classifications for the purposes of rule 9 of the *Public Service Classification Rules 2000*, a decision maker in the Federal Court of Australia has refused to provide the documents because they do not exist:

[https://www.righttoknow.org.au/request/role\\_evaluation\\_records\\_for\\_nati#incoming-29274](https://www.righttoknow.org.au/request/role_evaluation_records_for_nati#incoming-29274).

[1048](#) External Disclosure Report, part 7.5.2.2, and paragraphs 977 – 989 in particular.

[1049](#) External Disclosure Report, part 7.5.2.2, and paragraph 966 in particular.

[1050](#) *Australian Public Service Commissioner's Directions 2016* (Cth), s 20(1)(a).

[1051](#) *Australian Public Service Commissioner's Directions 2016* (Cth), s 20(1)(b).

[1052](#) *Australian Public Service Commissioner's Directions 2016* (Cth), s 19(1)(a).

[1053](#) *Australian Public Service Commissioner's Directions 2016* (Cth), s 19(1)(b).

[1054](#) *Australian Public Service Commissioner's Directions 2016* (Cth), s 19(1)(d).

[1055](#) External Disclosure Report, part 7.5.2.2.

[1056](#) As to the legislative requirement that findings be made on the basis of logically probative and relevant evidence, please refer to *Public Interest Disclosure Standard 2013* (Cth), s 12.

[1057](#) External Disclosure Report, part 7.5.1.

[1058](#) Annexure OMBR – 1.

[1059](#) Annexure OMBR – 1.

[1060](#) Annexure OMBR – 1.

[1061](#) Annexure OMBR – 1.

[1062](#) Annexure OMBR – 1.

[1063](#) Annexure OMBR – 1.

Sent with [Proton Mail](#) secure email.

----- Original Message -----

On Monday, December 12th, 2022, PID <PID@ombudsman.gov.au> wrote:

**OFFICIAL: Sensitive**

Dear Discloser